92-1403

No.

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CEDAR VALLEY CORP.,

Petitioner,

—against—

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Robert E. Konchar*
Kevin J. Visser
Stanley M. Herkelman
MOYER & BERGMAN
2720 First Avenue NE
P.O. Box 1943
Cedar Rapids, IA 52402-1943
(319) 366-7331

ATTORNEYS FOR PETITIONER

*Counsel of Record

QUESTIONS PRESENTED

Whether the decertification by an employer's work force displaces any prior construction industry pre-hire labor contracts.

Whether the National Labor Relations Act permits enforcement of a pre-hire labor contract made by a multiemployer association against a single nonmember employer where the association's members have withdrawn the association's authority to collectively bargain on their behalf.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the United States Court of Appeals for the Eighth Circuit are those set forth in the caption.*

*Petitioner is a closely held corporation and there are no parent or subsidiary corporations that are required to be disclosed under Supreme Court Rule 29.1.

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FOR THE EIGHTH CIRCUIT

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals entered in this action on August 26, 1992.

OPINIONS BELOW

The decision of the National Labor Relations Board entered on April 30, 1991 is reported at 302 NLRB No. 128 (App., *infra*, 28a - 33a) and adopts and affirms the decision of the Administrative Law Judge entered on June 4, 1990 (App., *infra*, 34a - 72a). The decision of the United States Court of Appeals for the Eighth Circuit entered on August 26, 1992 is reported at 977 F.2d 1211 (8th Cir. 1992) (App., *infra*, 1a - 27a).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Eighth Circuit was entered in this case on August 26, 1992 (App., *infra*, 1a). On November 27, 1992, the Eighth Circuit entered an order denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc (App., *infra*, 73a). This Court has jurisdiction to review the judgment of the Eighth Circuit pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

29 U.S.C. 158(f) provides:

(f) Agreements covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organi-

zation has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to Section 159(c) or 159(e) of this title.

STATEMENT OF THE CASE

Petitioner, Cedar Valley Corp., is a Waterloo, Iowa road building contractor. In 1978, Petitioner was awarded the first of four discrete, unrelated jobs it would perform at various times over the next eleven years in Davenport, Iowa. Davenport is located approximately 150 miles from Waterloo.

At the time of the first Davenport job in 1978, Petitioner was a party to labor agreements with four labor unions in the Waterloo area (collectively, the "Waterloo Unions"), each of which represented the employees of a different craft (equipment operators, cement finishers, truck drivers and laborers). The individuals represented by the Waterloo Unions composed the core of Petitioner's work force on all jobs it was awarded, regardless of the location of the job.

The Associated Contractors of Rock Island (the "Association") was an association of contractors for an area along the Mississippi River which includes Davenport, Iowa, but not Waterloo, Iowa. In 1978, the Association was a party to labor agreements permitted under §8(f) of the National Labor Relations Act, 29 U.S.C. §158(f), with the four labor unions in the Davenport area (collectively, the "Davenport Unions") who represented the four crafts generally employed by Petitioner.

In connection with the first Davenport job, Petitioner executed three so-called "me-too" agreements pursuant to which Petitioner became a "signatory employer" to the existing labor agreements between the Association and three of the Davenport Unions and, as such, was bound by the terms of the existing agreements. Each of the me-too agreements included a clause which stated that unless Petitioner timely notified the Union that it revoked the authority of the

Association to negotiate on its behalf, Petitioner would be bound by that particular agreement and all amendments to the agreement and any subsequent agreements between the Association and the Union.

In 1981, Petitioner performed the second job in the Davenport area. The only new agreement Petitioner signed and worked under in connection with that job was with the Davenport Union for the cement masons.

In 1983 and 1984, each of the four Waterloo Unions ceased to represent Petitioner's employees.[1] At the time of the decertification, the Petitioner had not received any information from either the Association or the Davenport Unions regarding the Association's labor agreements with the Davenport Unions since at least 1982, nor did it receive any information thereafter.

In 1985, Petitioner performed the third job in the Davenport area. In contrast to the prior two jobs in which a minority of Petitioner's workers were local Davenport area workers (who were predominantly employed in less skilled positions), following the decertification Petitioner employed only its existing employees.[2] Although at least one of the Davenport Unions was aware of this job, none of these unions filed any grievance or took any enforcement action against Petitioner.

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[1] The laborers and cement masons each voted to decertify their collective bargaining units in elections conducted by the National Labor Relations Board. In addition, the Waterloo Union representing the equipment operators withdrew its request for certification and the Waterloo Union representing the truck drivers disclaimed interest in Petitioner's bargaining unit when confronted with a petition to decertify.

[2] The uncontested evidence presented to the Administrative Law Judge indicated that the work performed on the 1978 and 1981 jobs was (cont. on page 6)

In late 1988 and early 1989, the members of the Association, the largest contractors in the Davenport area, became dissatisfied with the labor agreements between the Association and the Davenport Unions. These agreements were to expire by their terms on April 30, 1989. In order to be more competitive with non-union employers, eleven of the thirteen members of the Association withdrew their bargaining authority from the Association and sought to obtain substantial concessions through separate individual negotiations with each of the Davenport Unions.

These efforts culminated with each of the thirteen companies composing the Association entering into a separate agreement entitled an "Addendum" which embodied these special concessions. The title "Addendum" is a misnomer because it was signed only by individual employers and not the Association. *See*, *infra*, n. 4. Thereafter, the Association, only two members of which had not withdrawn bargaining authority from the Association (but who each had also entered into a separate Addendum), executed the agreements with the Davenport Unions to which the NLRB and Eighth Circuit have concluded that Petitioner is bound. These agreements conflicted with the Addendum and did not include the concessions found therein. Petitioner was not advised or

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(Cont. from page 5)
allocated on an hourly basis between the Davenport area workers and Petitioner's Waterloo employees as follows:

		1978	1981
Operators:	Davenport	56.5	200.0
	Waterloo	260.5	881.5
Truck Drivers:	Davenport	4.5	151.5
	Waterloo	42.5	171.0
Laborers:	Davenport	108.0	711.0
	Waterloo	174.0	1157.5
Cement Masons:	Davenport	-0-	291.0
	Waterloo	80.5	277.5

aware of any of these events at the time they occurred, nor had it been aware of any of the intervening collective bargaining activity since 1982.

In 1989, Petitioner performed its fourth job in the Davenport area and again, as with the 1985 job, used only its own employees. This was a "federal" project and therefore the wage scale for workers on the project was set under the guidelines implemented under the Davis-Bacon Act, 40 U.S.C. §§276a et seq. Petitioner's use of its own employees, instead of the Davenport Unions' "hiring hall" workers, did not result in a lower wage scale for Petitioner.

Each of the four Davenport Unions filed charges against Petitioner with the National Labor Relations Board ("NLRB") alleging that in performing the 1989 job Petitioner had failed to honor its obligations under the recent collective bargaining agreements entered into between the Association and the Davenport Unions. The Davenport Unions alleged that Petitioner was bound to the new agreements under the me-too agreements Petitioner executed over ten years before. An Administrative Law Judge found in favor of the Davenport Unions and his decision was affirmed by the NLRB and the Eighth Circuit. Subject matter jurisdiction over this case was vested in the Eighth Circuit pursuant to 29 U.S.C. §160(e), (f).

REASON FOR GRANTING THE PETITION

This Petition for Certiorari seeks review of the Eighth Circuit's judgment enforcing the NLRB's order finding that Petitioner refused to bargain with the Davenport Unions. Petitioner acknowledges that it refused to bargain with the unions at the commencement of the 1989 paving project, but asserts that it was under no duty to do so because (1) its employees rejected union representation in 1984 by decertify-

ing, and (2) the Association which signed the underlying collective bargaining agreements is no longer empowered to collectively bargain for its own members, let alone me-too signatories such as Petitioner.

A. THE EIGHTH CIRCUIT'S DECISION DISENFRANCHISES EMPLOYEES TO THE BENEFIT OF CONSTRUCTION INDUSTRY LABOR UNIONS BY RESTRICTING THE STATUTORY RIGHT TO DECERTIFY AND REJECT UNWANTED UNION REPRESENTATION AND BY EXPANDING THE LIMITED RIGHTS OF SUCH UNIONS.

Petitioner's workers work exclusively for Petitioner and are in every sense "employees" of Petitioner. These employees work for Petitioner on every project Petitioner performs, regardless of location. In 1984 these employees exercised their statutorily protected right[3] not to be represented by their former exclusive bargaining representatives, the Waterloo Unions. This Petition raises, apparently for the first time, the issue of whether the rejection of unwanted union representation by the permanent employees of a single employer will obviate an employer's outstanding me-too labor agreements in place at the time of the workers' decertification.

The fundamental principle of employee free choice underlying the National Labor Relations Act (the "Act") forbids a union and employer from entering into a binding labor agreement until such time as the union has been authorized to represent the employer's workers by an affirmative election of

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[3] 29 U.S.C. §159(e) and 29 U.S.C. §158(f) permit a majority of employees to decertify union representation. In the case of 29 U.S.C. §158(f), "decertification" is something of a misnomer in that unions are never "certified" as they are under 29 U.S.C. §159(a). Nevertheless, an express statutory proviso to 29 U.S.C. §158(f) guarantees employees the right to reject unwanted union representation in the construction industry.

a majority of those workers. In 1959, §8(f) of the Act was enacted to create an exception to this general rule in the construction industry. 29 U.S.C. §158(f). It recognizes that some contractors essentially contract on a project by project basis and permits so-called "pre-hire agreements" to be entered into between a union and employer in the construction industry. Under these agreements, a union can effectively enter into binding terms of employment on behalf of employees it does not yet represent, subject to the important statutory proviso that the employees may later affirmatively vote to reject the representation of the union.

In 1987, the NLRB substantially revamped the rules governing pre-hire agreements in *John Deklewa & Sons*, 282 NLRB 184 (1987), *enfd. sub nom.*, *International Association of Bridge, Structural and Ornamental Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988), *cert. den.*, *Deklewa v. NLRB*, 488 U.S. 889 (1988), and held that pre-hire agreements could not be unilaterally repudiated by an employer during their term. The NLRB explained that this conclusion was premised on four critical interpretative principles:

> We shall apply the following principles in 8(f) cases: (1) a collective bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) *such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and 9(e)[which permit decertification]; (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement;* and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

Deklewa, 282 NLRB 184 at 1377-78 (emphasis). The Board further explained:

> During its term, an 8(f) contract will not act as a bar to petitions pursuant to Section 9(c) or (e). *In determining the appropriate unit for election purposes the Board will no longer distinguish between "permanent and stable" and "project by project" work forces, and single employer units will normally be appropriate.* In the event of an election, a vote in favor the signatory union, or a rival union, will result in that union's certification and the full panoply of Section 9 rights and obligations. *A vote to reject the signatory union will void the 8(f) agreement and will terminate the 8(f) relationship....*

Deklewa, 282 NLRB 184 at 1385 (emphasis added).

In *Deklewa*, the Board specifically recognized that the two "overwhelming objectives" of the Act are "the promotion and protection of employee free choice and labor relations stability." *Deklewa*, 282 NLRB 184 at 1342. Three of the four principles announced in *Deklewa* specifically seek to advance the first of these objectives.

Notwithstanding the unambiguous language of 8(f) permitting employee decertification and the principle announced in *Deklewa* that "single employer units" are controlling for purposes of decertification, the Administrative Law Judge essentially dispensed with this difficult issue in two sentences:

> The decertification of Union X does not decertify Union Y. If grounds exist to repudiate a contract with Union A or grounds exist to justify a refusal to bargain with Union A it does not follow that an employer may repudiate a contract with Union B or refuse to bargain with Union B.

Cedar Valley Corp. and Local Union No. 309, Laborers International Union of North America, AFL-CIO, et al., 302 NLRB No. 128 (April 30, 1991), adopting A.L.J. Op. at 14 (App., *infra*, at 58a).

The Eighth Circuit also concluded that the decertification of the Waterloo Unions by Petitioner's work force was not dispositive. The Court stated:

> Not all [Petitioner's] employees in a craft must be represented by one exclusive bargaining representative. Rather, employees in different geographical locations are represented by different bargaining representatives who, though exclusive as to employees in that area, are independent from exclusive representatives of employees in other places.

Cedar Valley Corp. v. NLRB, 977 F.2d 1211, 1217 (8th Cir. 1992) (App., *infra*, at 10a - 11a).

Petitioner, however, does not have "employees" in Davenport. Its employees are in Waterloo and they travel to the jobs with Petitioner, including all four of the Davenport jobs. Prior to the time these employees affirmatively decertified in 1984, Petitioner signed on to the existing pre-hire agreements with the Davenport Unions as an extension of its relationship with the Waterloo Unions, but the core group of the workers governed by these agreements were Petitioner's Waterloo employees. The Davenport Unions therefore represented essentially the same employees as the Waterloo Unions and these employees rejected union representation in 1984, more than five years before the 1989 Davenport job involved in this case.

As previously noted, §8(f) was a statutory provision that was enacted to address the needs often encountered in the construction industry where employers hire employees on a project by project basis. However, under both the rules governing permanent and stable work forces that existed prior to *Deklewa* and under the single employer unit principle announced in *Deklewa*, the NLRB has properly recognized that if an employer has its own regular employees, those

employees are the appropriate unit to exercise the rights conferred under §8(f), including the rights granted to protect employee free choice. Where, as here, that unit has spoken, it makes no sense to require them to affirmatively vote to decertify every union that purports to continue to represent them via a me-too agreement executed years before their decertification.

It is critical to note that the Petitioner gained no economic advantage by using its own workers rather than referrals from the Davenport Unions. The wage and benefit rates were set by the Davis-Bacon federal prevailing wage law. Rather, the decisions below effectively nullify the statutory proviso permitting rejection of unwanted union representation in the construction industry. The expansion of the "very limited" rights granted to construction industry labor unions at the expense of the industrial worker's rights to choose his or her representative is neither rational nor consistent with the Act.

The Eighth Circuit's ruling will disenfranchise those workers who have toiled for Petitioner in good years and bad, and will impose upon Petitioner the obligation to hire workers from the union hall, which will surely include none of Petitioner's workers. This result cannot be reconciled with §8(f) or the principles announced in *Deklewa*.

B. THE EIGHTH CIRCUIT'S DECISION CANNOT BE RECONCILED WITH THE D.C. CIRCUIT'S DECISION IN *WILSON AND SONS HEATING AND PLUMBING v. NLRB*, 971 F.2d 758 (D.C. Cir. 1992), WHICH CONCLUDES THAT IT WOULD "BE ANOMALOUS TO BIND THE COMPANY TO THE TERMS OF AN AGREEMENT THAT NO LONGER EXISTED".

On April 30, 1991, the National Labor Relations Board issued two decisions in which it concluded that a non-member, signatory employer to a me-too agreement was bound to

the terms of an agreement executed by a multi-employer association even though the members of the association were themselves not bound by the agreement and were in fact parties to more favorable labor agreements. *Wilson and Sons Heating and Plumbing, Inc. and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local 109*, 302 NLRB No. 126 (April 30, 1991); *Cedar Valley*, 302 NLRB No. 128 (April 30, 1991). Each decision was appealed, one to the Court of Appeals for the District of Columbia and one to the Court of Appeals for the Eighth Circuit. On August 7, 1992, the Court of Appeals for the District of Columbia issued an opinion refusing to enforce the NLRB's order and holding that it would be "anomalous" to hold a signatory employee bound to an agreement after the association members had secured a new, more favorable agreement. *Wilson and Sons Heating and Plumbing, Inc. v. NLRB*, 971 F.2d 758 (D.C. Cir. 1992). Nineteen days later, the Eighth Circuit issued its opinion which reached a contrary conclusion and affirmed the NLRB decision. *Cedar Valley Corp. v. NLRB*, 977 F.2d 1201 (8th Cir. 1992) (App., *infra*, at 1a).

As directed by this Court in *Litton Financial Services v. NLRB*, 111 S. Ct. 2215 (1991), the *Wilson* court properly granted "no particular deference" to the NLRB's interpretation of the underlying collective bargaining agreement and decided the question *de novo*. *Wilson*, 971 F.2d at 760. In *Wilson*, the employer had bound itself to a master agreement negotiated between a union and an employer association, of which the employer was not a member, and had failed to terminate the agreement according to the terms set forth therein. Interpreting the collective bargaining agreement, the NLRB ordered Wilson to be bound by the continuing renewal clauses of the master agreement, "even though the association had

prevented automatic renewal as to itself by giving suitable notice and negotiating a new agreement." *Wilson*, 971 F.2d at 759. The Court explained:

> It would surely be anomalous to bind the company to the terms of an agreement that no longer existed, especially as Wilson's past letters of assent presumably reflected a notion that its labor costs would likely remain competitive if its labor relations were more onerous than its competitors'. That premise would obviously be undone if the association members secured a new agreement more favorable than the old while Wilson remained tied to the old.

Wilson, 971 F.2d at 760-61 (citation omitted). The Court further observed in a footnote that "[i]t would be folly for non-association members to bind themselves to automatic renewal if the association could obviate renewal as to its members by a notice given on the last possible day or given without disclosure to non-members." *Wilson*, 971 F.2d at 761 n.2.

The Eighth Circuit's decision fails to apply the standard of review set forth by this Court in *Litton*, which the D.C. Circuit properly applied, and cannot be reconciled with *Wilson*. Perhaps most importantly, however, and as the reasoning in *Wilson* suggests, the Eighth Circuit fundamentally misapprehends the nature and function of me-too agreements. In doing so, the Eighth Circuit has set a dangerous precedent for smaller, independent employers who sign on to labor agreements negotiated by multi-employer associations.

Under a me-too agreement, an employer binds itself to an agreement negotiated between other employers and the union. The purpose of a me-too agreement is to permit an independent employer to obtain the benefit of the same competitive terms and conditions of a collective bargaining agreement negotiated between larger contractors and the union. As the Ninth Circuit has succinctly stated:

> Preliminarily, we should note that the basic purpose of a "me-too agreement" is to allow independent, usually smaller, employers to obtain all the benefits of the master collective bargaining agreement that is negotiated by the principal employers in the industry without having to participate in the industry negotiations, or to engage in separate negotiations, every few years. *Thus, the independent employer is assured that (1) it will not be subject to a contract containing more onerous conditions than are applicable to its competitors, (2) it will obtain whatever protections or advantages the industry collective bargaining agreement provides other employers,* (3) it will be saved the cost of expensive negotiations, and most pertinent here, (4) it will be covered by an agreement whenever the rest of the industry is covered and not subject to an agreement whenever the rest of the industry is not.

Arizona Laborers, Teamsters, and Cement Masons Local 395 Health & Welfare Trust Fund v. Conquer Cartage Co., 753 F.2d 1512, 1518 (9th Cir. 1985)(emphasis added).

The purpose of a me-too agreement is undermined and in fact becomes a trap for signatory employers if the members of the multi-employer association are not bound by the terms of subsequent agreements the association reaches with the union, particularly when these same employers reach separate agreements with the union on more favorable terms. This, however, is precisely what happened between the Association and the Union in 1989. After eight years with virtually no contact with the Davenport Unions, Petitioner, through the application of the 1978 me-too agreements, found itself locked into an agreement with the Unions that the Association had executed on "behalf" of the Petitioner and the other signatory employers, but which the members of the Association themselves found unacceptable and to which they were not bound.

The NLRB, through the Administrative Law Judge, treated this alarming state of affairs as almost a non-issue, stating that "[n]eedless to say the fact that the number of employers who are members of the Association rises or falls or the fact that many members of the Association withhold bargaining authority from the Association *is irrelevant.*" *Cedar Valley*, 302 NLRB No. 128 (April 30, 1991), adopting A.L.J. Op. at p. 15 (emphasis added) (App., *infra*, at 60a). In reviewing this conclusion, the Eighth Circuit determined that "*implicit* within the NLRB's holding is the factual finding that [the Association] had not disintegrated or ceased to exist at the time of the 1989 successor agreements" and that this finding was supported by substantial evidence. *Cedar Valley*, 977 F.2d at 1222 (emphasis added) (App., *infra*, at 21a). This "support," however, consisted of references to the record that indicate that although the members of the Association withdrew bargaining authority from the Association, they remained members of the Association for other purposes. *Cedar Valley*, 977 F.2d at 1222 (App., *infra*, at 21a - 23a).[4]

The NLRB's and Eighth Circuit's resolution of this issue is simply in error. The ability and legitimacy of a multi-employer association to bargain on behalf of its members and the signa-

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[4] The Eighth Circuit's statement that "had these employers fully withdrawn as members of [the Association] signing the addendum would have been a meaningless gesture" (*Cedar Valley*, 977 F.2d at 1222, App., *infra*, at 23a) reflects a stunning misapprehension of the record. The "addendum" was an agreement signed by all thirteen members of the association in their individual capacities with all four unions. These member employers secured, individually, significant concessions. The addendum was executed *after* eleven of thirteen of these members withdrew bargaining authority from the association. Only later did the "association" sign its own separate agreements, containing more stringent language, more expensive labor costs, etc. It is these contracts to which the NLRB and the Eighth Circuit hold the non-member employers, creating the "anomaly" so readily discerned by the *Wilson* court.

tory employers is premised on the fact that the negotiating members will be bound by the terms of the agreement they negotiate. That fact insures that the negotiating employers have an incentive to arrive at the best deal possible for the Association and is the mechanism by which signatory employers know they "will not be subject to a contract containing more onerous conditions then are applicable to its competitors." *Arizona Laborers*, 753 F.2d at 1518 (9th Cir. 1985). If the Association lacks authority to bargain for and bind its members, it surely should not be able to bind a nonmember employer through the operation of a me-too agreement executed over ten years before.

The Eighth Circuit's decision has made the anomaly hypothesized by the D.C. Circuit a reality. This Court should intervene to resolve the conflict between these decisions and to preserve the usefulness of me-too agreements as a vehicle for assuring an efficient and competitive labor market.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Robert E. Konchar

Robert E. Konchar*
Kevin J. Visser
Stanley M. Herkelman
MOYER & BERGMAN
2720 First Avenue NE
P.O. Box 1943
Cedar Rapids, IA 52402-1943
(319) 366-7331
ATTORNEYS FOR PETITIONER
*Counsel of Record

APPENDIX TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

A. Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit entered on August 26, 1992 in *Cedar Valley Corp. v. NLRB*, 91-2160. ..... 1a

B. Decision and Order entered by the National Labor Relations Board on April 30, 1991 in *Cedar Valley Corp. v. Local Union 300, Laborers International Union of America, AFL-CIO, et. al.*, Cases No. 33-CA—8721, 8724, 8735, 8821. ..... 28a

C. Decision entered by Martin J. Linsky, Administrative Law Judge on June 4, 1990 in *Cedar Valley Corp. v. Local Union 300, Laborers International Union of America, AFL-CIO, et. al.*, Cases No. 33-CA—8721, 8724, 8735, 8821..... 34a

D. Order Denying Petition for Rehearing and Petitioner for Rehearing En Banc entered on November 27, 1992 in *Cedar Valley Corp. v. NLRB*, 91-2160. ..... 73a

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-2160

Cedar Valley Corporation,	*	
	*	
Appellant,	*	Petitioner for Review
	*	of Order of
vs.	*	National Labor
	*	Relations Board
National Labor Relations Board,	*	
	*	
Appellee.	*	

JUDGMENT

This cause was submitted on the petition for review of an order of the National Labor Relations Board, administrative record, and briefs of the parties and was argued by counsel.

After consideration, it is hereby adjudged and decreed that the order of the National Labor Relations Board is affirmed in accordance with the opinion of this Court.

August 26, 1992

A true copy.

ATTEST:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2160

Cedar Valley Corporation, Appellant,	*	
v.	*	Appeal from the National Labor Relations Board
National Labor Relations, Board, Appellee.	*	

Submitted: March 9, 1992
Filed: August 26, 1992

Before, FAGG, Circuit Judge, BEAM, Circuit Judge, and GAITAN,* District Judge.

GAITAN, District Judge.

The focus of this appeal is a decision by the National Labor Relations Board (hereinafter NLRB) adverse to petitioner, Cedar Valley Corporation (hereinafter Cedar Valley). Citing ***John Deklewa & Sons*, 282 N.L.R.B. 184 (1987), *enfd. sub nom., Iron Workers Local 3 v. N.L.R.B.*, 843 F.2d 770 (3d. Cir.), *cert. denied*, 488 U.S. 889 (1988),** the NLRB rendered a Decision and Order holding that Cedar Valley violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a) (1988), by unilaterally repudiating Section 8(f) agreements with the charging labor unions before the agreements' expiration. Cedar Valley petitions for review of the NLRB's Decision and Order arguing that it is invalid and therefore enforcement should be denied.

* The HONORABLE FERNANDO J. GAITAN, JR., United States District Court Judge for the Western District of Missouri, sitting by designation.

I. FACTUAL SUMMARY

Cedar Valley is a corporation headquartered in Waterloo, Iowa and is engaged in the business of road construction. During the 1970s and through 1982, Cedar Valley's employees were represented by four labor unions in the Waterloo area: Operating Engineers Local 234, Cement Masons Local 818, the Iowa Laborers' District Council, and Teamsters' Local 844. In October of 1984, the employees represented by Operating Engineers Local 234 and Iowa Laborers' District Council voted to terminate this representation through decertification of these unions. At approximately the same time, Cement Masons Local 818 and Teamsters' Local 844 disclaimed interest in representing Cedar Valley employees in Waterloo.

Cedar Valley's relationship with the complaining unions began in 1978 (during the pendency of the collective bargaining agreements with the Waterloo labor unions) when Cedar Valley was awarded a road construction contract near Davenport, Iowa. Also during 1978, agents for Cedar Valley signed collective bargaining agreements (hereafter Quad City Agreements) already in existence between Illinois construction unions in the Quad City area and a local multi-employer association of construction employers (hereafter Associated Contractors). Among the Illinois construction unions party to the Quad City Agreements signed by Cedar Valley were Laborers Local 309, Operating Engineers Local 537, Cement Masons 544, and Teamsters 371 (hereafter Complaining Unions). The complaining unions are labor organizations based in Rock Island, Illinois, with jurisdiction in Rock Island, Moline, and East Moline, Illinois, and Davenport, Iowa, and their environs, an area known as the "Quad Cities".

Pursuant to the Quad City Agreements signed by Cedar Valley in 1978, the 1978 project was completed using roughly

one-half existing Cedar Valley employees and one-half locally referred workers. In 1981, Cedar Valley was awarded a second road construction contract in the Davenport area. Cedar Valley honored the Quad City Agreements signed in 1978 and again local workers comprised approximately one-half of the workforce.[1]

In 1985, Cedar Valley's bid on a third project in the Davenport area was accepted. To complete this project Cedar Valley used Cedar Valley employees to the exclusion of any employees from Laborers Local 309, Operating Engineers Local 537 or Cement Masons 544. However, before the project commenced a Teamsters' Business Agent confronted Cedar Valley about apparent violations of the Quad City Agreements signed in 1978. In response, Cedar Valley's Vice president stated that Cedar Valley had severed its relationship with the Teamsters in the previous two years. No action was taken against Cedar Valley by the complaining unions as a result of its actions in the 1985 project.[2]

In April of 1989, Cedar Valley was awarded a 4.2 million dollar contract to pave eight miles of interstate highway near Davenport. Prior to, or immediately after, commencement of work on this project, three of the complaining unions (excluding Teamsters) approached Cedar Valley concerning "pre-job conferences" pursuant to the 1978 Quad City Agreements.[3]

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[1] In 1981 Cedar Valley, through a corporate officer, signed the then current agreement between the Cement Masons 544 and Associated Contractors. This agreement was essentially identical to the 1978 agreement.

[2] Despite the protest initially expressed by the Teamsters' agent, no action was taken against Cedar Valley by Teamsters: All drivers at the interstate construction site were represented by the Teamsters' Union 371 via a subcontractor who was a member of the multi-employer association of construction employers in the Quad City area.

Cedar Valley refused to recognize the complaining unions and expressed its belief that it was no longer bound by the 1978 agreements. As a basis for this refusal, Cedar Valley cited the 1984 decertification proceedings by the Waterloo unions and the lack of contact between Cedar Valley and the complaining unions since 1981. The interstate highway project was completed without employees of the complaining unions. The complaining unions brought this action in an effort to enforce their rights under the 1978 Quad City Agreements.

II. STANDARD OF REVIEW

The appropriate standard of review is somewhat in dispute.

The NLRB argues that, in light of this Court's acceptance of ***Deklewa,*** the issues presented by this appeal are primarily factual. "Thus, the Board's findings that the Company (Cedar Valley) was bound to current Section 8(f) pre-hire agreements with the Union in 1989 must be upheld if supported by substantial evidence." **Respondent's Brief,** p. 12 (citing ***Universal Cameral Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951)**). Cedar Valley argues that the proper standard of review is multifaceted and in addition to factual findings, the NLRB's decision incorporated interpretation of the controlling statutes and contracts.[4]

In due consideration of these arguments, the Court finds the standard of review stated in ***GSX Corp. of Missouri v. N.L.R.B.*, 918 F.2d 1351 (8th Cir. 1990),** controlling. "This court must enforce the Board's order if the Board has correctly applied the law and if its findings rest upon substantial evi-

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[4] The Teamsters' Union registered its objection to Cedar Valley's activities on the 1989 project after work had commenced. A Teamsters' representative went to the work site and presented copies of the collective bargaining agreements and a business card to a Cedar Valley agent. Cedar Valley did not reply to the Teamsters' as a result of this visit.

dence." ***Id.* at 1356.** This standard of review is controlling of all arguments presented by Cedar Valley except the argument concerning the Board's misinterpretation of the collective bargaining agreement between Teamsters' 371 and Associated Contractors. As to that argument, the Court will conduct a *de novo* review of any contract interpretation engaged in by the Board. ***See Litton Fin. Printing v. N.L.R.B.*, 111 S. Ct. 2215, 2223 (1991)** (In finding that the Board's interpretation of a collective bargaining agreement should be reviewed without deference to the Board's finding, the Court held that "the Board is neither the sole nor the primary source of authority in such matters . . .").

Therefore, as to all findings except contract interpretation, the NLRB must be sustained if: (1) it started with the currently controlling law; (2) it correctly applied this law; and (3)

In its Reply Brief, Cedar Valley acknowledges that the "substantial evidence test" must control as to the factual findings made by the NLRB. However, Cedar Valley argues that this court should review the NLRB's factual findings more critically than normal under the substantial evidence test because the ALJ failed to make essential factual findings of fact than is this Court." **Cedar Valley's Reply Brief, p. 3** (citing ***GSX Corp. of Missouri v. N.L.R.B.*, 918 F.2d 1351 (8th Cir. 1990).**

Cedar Valley also argues that the "appeal is not based upon claims of erroneous fact findings." Rather, "Cedar Valley urges that the Board has misapplied its own interpretation of Section 8(f), and that it has misinterpreted the so-called collective bargaining agreements entered into in 1978." **Cedar Valley's Reply Brief, p. 4.** Accordingly, Cedar Valley argues that (1) the NLRB's statutory interpretation and/or application should be reversed if "plainly erroneous or inconsistent with...the Deklewa principles." ***Id.* at 3** (citing ***First National Bank in Sioux Falls v. National Bank of South Dakota*, 667 F.2d 708 (8th Cir. 1981)**); and (2) the NLRB's interpretation of the underlying contracts should be reviewed *de nova*. **Cedar Valley's Reply Brief, p. 3** (citing ***Litton Fin. Printing v. NL.R.B.*, 111 S. Ct. 2215 (1991)**).

The court finds ***Litton Fin. Printing*** controlling as to contract interpretation. However, the court disagrees that the Board or ALJ engaged in statutory interpretation and refuses to review the Board's decision within the context.

substantial evidence supports its finding that Cedar Valley's actions violated Section 8(a) (1) and (5) of the National Labor Relations Act.

III. ANALYSIS

There is no dispute that the NLRB's interpretation of Section 8(f) in ***John Deklewa & Sons*, 282 N.L.R.B. 184 (1987), *enfd. sub nom., Iron Workers Local 3 v. N.L.R.B.*, 843 F.2d 770 (3d. Cir. 1988)**, governs this action. ***Deklewa*** has recently been adopted by this Court as the proper and controlling interpretation of Section 8(f). ***N.L.R.B. v. W.L. Miller Co.*, 871 F.2d 745, 747-48 (8th Cir. 1989)**. In ***Deklewa***, the NLRB broke from the previous interpretation of Section 8(f) as stated in ***R.J. Smith Constr. Co.*, 191 N.L.R.B. 693 (1971), *enf. denied sub nom., Operating Engineers Local 150 v. N.L.R.B.*, 480 F.2d 1186 (D.C. Cir. 1973), *overruled by N.L.R.B. v. Local Union No. 103, International Association of Bridge, Structural and Ornamental Iron Workers*, 434 U.S. 335 (1978)**, and held that "pre-hire" agreements made pursuant to Section 8(f) are "binding, enforceable, and not subject to unilateral repudiation" throughout their term. ***Deklewa*, 282 N.L.R.B. 184, at 1389 & n. 62.** This conclusion was derived from four interpretive principles stated by the Board:

> We shall apply the following principles in 8(f) cases: (1) a collective bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

***Deklewa*, 282 N.L.R.B. 184 at 1377-78.** The Board went on to further expand these principles within the context of effectuating the organic statute.

> Taken together, the four basic principles we advance today provide an overall framework for the interpretation and application of Section 8(f) which will enable parties to 8(f) agreements and employees to know their respective rights, privileges, and obligations at all stages in their relationship. When parties enter into an 8(f) agreement, they will be required, by virtue of Section 8(a)(5) and Section 8(b)(3), to comply with that agreement unless the employees vote, in a Board-conducted election, to reject (decertify) or change their bargaining representative. Neither employers nor unions who are party to 8(f) agreements will be free unilaterally to repudiate such agreements. During its term, an 8(f) contract will not act as a bar to petitions pursuant to Section 9(c) or (e). In determining the appropriate unit for election purposes the Board will no longer distinguish between "permanent and stable" and "project by project" work forces, and single employer units will normally be appropriate. In the event of an election, a vote in favor of the signatory union, or a rival union, will result in that union's certification and the full panoply of Section 9 rights and obligations. A vote to reject the signatory union will void the 8(f) agreement and will terminate the 8(f) relationship . . . Even absent an election, upon the contract's expiration, the signatory union will enjoy no majority presumption and either party may repudiate the 8(f) relationship.
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> ***Deklewa*, 282 N.L.R.B. 18- at 1385.**

Arguing from the principles stated in ***Deklewa*,** Cedar Valley attacks the validity of the NLRB's Decision and Order from a variety of angles. Cedar Valley alleges that: (1) The decertification of the Waterloo labor unions in 1982 acted to terminate the Quad City Agreements between Cedar Valley

and the complaining unions; (2) The Section 8(f) Quad City Agreements of 1978 expired prior to 1982 and thus, under ***Deklewa,*** the complaining unions enjoyed no presumption of majority and the agreements were unenforceable; (3) Even if this Court finds that ***Deklewa*** was properly applied to the facts of this action, retroactive application is manifestly unjust; (4) The alleged disintegration of Associated Contractors frustrated the 1978 Quad City Agreements; and (5) The Board misinterpreted the Local 371 contract.[5]

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[5] Cedar Valley also argues that (1) it formally repudiated the 1978 Quad City Agreements with Laborers Local 309, Operating Engineers Local 537 and Teamsters 371 prior to the 1989 successor agreements' and (2) Cedar Valley's 1985 conduct repudiated the 1978 agreements. The court finds that these arguments lack merit.

First, the record is devoid of any facts supporting a conclusion that Cedar Valley formally terminated the 1978 agreements, by the method prescribed by the agreements, prior to the 1989 agreements. Additionally, Cedar Valley has not even alleged or argued facts supporting the existence of the required formal repudiation. Instead, Cedar Valley relies on the argument that it repudiated the agreements in a time "gap" between the April 30, 1989, expiration and the effective date of successor agreements. This time "gap" argument is only effective as to Laborers 309 and Operating Engineers 537: Both the 1978 agreement between Teamsters' 371 and Associated Contractors and the 1981 agreement between Cement Masons 544 and Associated Contractors renewed automatically and were not dependent on successor agreements entered into by Associated Contractors. As to Laborers 309 and Operating Engineers 537, the Board concluded that "[t]he records shows, however, that there was, in fact, no 'gap.'" Based upon testimony from officers of Operating Engineers 537 and Laborers 309, the NLRB concluded that "new agreements were effective on the April 30, 1989, expiration of the old contracts...." Accordingly, Cedar Valley's claim that it formally repudiated the controlling agreements is without merit.

Second, Cedar Valley's "repudiation by conduct" is not well founded: ***Deklewa*** firmly establishes that a party to a Section 8(f) authority cited by Cedar Valley in support of this argument predates ***Deklewa.*** In light of ***Deklewa*** this court refuses to accept the "repudiation by conduct" argument. To hold that a single party can repudiate a contract simply by acting in violation of the agreement would serve only to emasculate ***Deklewa.***

This Court finds that Cedar Valley has failed to show that the Board applied the wrong law (or the right law incorrectly) or that its decision is not supported by substantial evidence. Accordingly, we are compelled by the applicable standard of review to affirm and enforce the Decision and Order of the NLRB.

A. DECERTIFICATION BY TEE WATERLOO UNIONS

In October of 1984, Waterloo employees of Cedar Valley voted to decertify the Waterloo labor organizations of Operating Engineers Local 234 and Iowa Laborers' District Council as their representatives. At approximately the same time, the Cement Masons Local 818 and Teamsters' Local 844 disclaimed any desire to further represent Cedar Valley employees. Cedar Valley concludes that "the 1983-1984 decertification activity extinguished the rights of Davenport unions (the complaining unions) under their 1978 pre-hire agreements . . ." **Petitioner's Brief, p. 18.** The fundamental presumption underlying Cedar Valley's argument is that all Cedar Valley employees in a craft are represented by a single, exclusive bargaining representative.

The NLRB, through the ALJ, disagreed. "[T]he four Charging Party Unions were not parties or even notified about the Region 18 litigation regarding their sister locals . . . A decertification of Union X does not decertify Union Y. If grounds exist to repudiate a contract with Union A or grounds exist to justify a refusal to bargain with Union A it does not follow that an employer may repudiate a contract with Union B or refuse to bargain with Union B." **Decision of the ALJ, p. 14.** In adopting the ALJ's argument, the NLRB clearly relies on a fundamental presumption contrary to Cedar Valley's: Not all Cedar Valley employees in a craft must be represented by one exclusive bargaining representative. Rather, employees in different geographical locations are represented by different

bargaining representatives who, though exclusive as to employees in that area, are independent from exclusive representatives of employees in other places.

Cedar Valley relies on ***Bentson Contracting Co. v. N.L.R.B.*, 941 F.2d 1262 (D.C. Cir. 1991)**, which states that "[t]wo unions . . . simply cannot be the exclusive bargaining representative of the same employee." ***Id.* at 1266.** The Court in ***Bentson*** reviewed the NLRB's decision to grant competing unions the right to represent "combination" employees who did work falling within the parameters of each craft. The Court rejected the NLRB's "combination" representation, holding that a single worker could not be represented by more than one representative. ***Id.* at 1267.** While this Court does not question the wisdom of ***Bentson,*** neither does it find it supportive of Cedar Valley's argument. The issue here is not whether a single employee can be represented by two bargaining representatives, but whether employees of one employer who are located in different geographical areas can have different exclusive representatives.

Section 9(a) of the National Labor Relations Act provides that "[r]epresentatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such units . . .." **29 U.S.C. § 159(a) (1988).** The statute charges the NLRB with determining whether a unit is appropriate for exclusive representation. **29 U.S.C. § 159(b) (1988).** In making this determination, the "community of interests" analysis is used. ***See Electronic Data Sys. Corp. v. N.L.R.B.*, 938 F.2d 570, 573 (5th Cir. 1991).** "Factors used to determine a 'community of interests' include 'bargaining history, operational integration, geographic proximity, common supervisor, similarity in

job function, and employee interchange." ***Id.*** (quoting ***N.L.R.B. v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156 (5th Cir. 1980)**). Further, while the Board should consider all the factors, "its discretion is not limited by a requirement that its judgment be supported by all, or even most, of the potentially relevant factors." **N.L.R.B. v. DMR Corp., 795 F.2d 472, 475 (5th Cir. 1986)** (quoting ***International Ass'n of Machinists and Aerospace Workers v. N.L.R.B.*, 759 F.2d 1477, 1480 (9th Cir. 1985)**). Indeed, the NLRB's determination as to the appropriateness of a bargaining unit will rarely be disturbed and this Court's scope of review is narrow. ***Electronic Data Sys. Corp. v. N.L.R.B.*, 938 F.2d 570, 572 (5th Cir. 1991).**

Through the ALJ, the NLRB implicitly held that the appropriate units for exclusive representation in this case were a function of crafts and geographical factors: That is, the Waterloo units of the Teamsters, Cement Masons, Operating Engineers and Laborers are distinct and independent from their sister units in the Quad City area. The Quad City agreements of 1978 clearly establish the geographical scope of the complaining unions' jurisdiction. Roughly stated, the broadest possible scope of jurisdiction under the 1978 agreements included Scott County, Iowa, Rock Island and Mercer Counties, Illinois. Cedar Valley has stipulated, directly or indirectly, that the units involved in decertification were "employees at Respondent's (Cedar Valley) facility in Waterloo, Iowa . . ." **Exhibit R-7, p. 2-3.**

In light of the above, the NLRB and the ALJ were justified in holding that "decertification of Union X does not decertify Union Y" where unions X and Y represent different bargaining units and are not united by a "community of interests." In this case, the NLRB and ALJ did not err in finding, pursuant to the

"community of interests" analysis, that the Waterloo unions and the complaining unions were different bargaining units. Given the deference to which the NLRB is entitled in regards to the determination, this Court will not substitute its judgment for the NLRB's as to the appropriateness of the bargaining units in Waterloo and the Quad City area. **See *Electronic Data Sys. Corp. v. N.L.R.B.*, 938 F.2d 570, 572 (5th Cir. 1991).**

B. EFFECTIVE TERMS OF THE QUAD CITY AGREEMENTS

In ***Deklewa***, the NLRB stated that the obligations imposed by Section 8(f) agreements "are limited to prohibiting the unilateral repudiation of the agreement until it expires or until that employer's unit employees vote to reject or change their representative." ***Deklewa*, 282 N.L.R.B. 184 at 1387.** From this language, Cedar Valley argues that the Quad City Agreements of 1978 cannot be enforced by the complaining unions. Cedar Valley founds this argument on three grounds: (1) Pursuant to ***Deklewa***, the Section 8(f) Quad City Agreements expired upon decertification of the Waterloo unions by Cedar Valley employees; (2) The lack of contact, or an ongoing relationship, between the complaining unions and Cedar Valley demonstrates that the Quad City Agreements had expired; and (3) Even assuming the Quad City Agreements were valid until April 30, 1989, between this expiration date and the signing of subsequent agreements between Operating Engineers 537, Laborers 309, and Associated Contractors, there was a time "gap" in which Cedar Valley repudiated any existing relationships with Operating Engineers 537 and Laborers 309.[6]

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[6] This argument is inapplicable to the automatically renewed agreement Cement Masons 544. **See *supra* note 5.**

1) The Terms of the Agreements

Separate agreements existed between each of the complaining unions and Associated Contractors. While the complaining unions and Associated Contractors were the primary parties to these agreements, individual construction employers could also become bound by the terms of the agreements by signing the agreements. During the summer of 1978, Cedar Valley, a "non-member employer," signed the four agreements existing between the complaining unions and Associated Contractors.

The agreements signed by Cedar Valley existing between Operating Engineers 537, Laborers 309 and Associated Contractors bound Cedar Valley to "any amendments, extensions or changes in this Agreement agreed to between the Union and the Association, and further [bound Cedar Valley to] the terms and conditions of all subsequent contracts negotiated between the Union and the Association unless ninety (90) days prior to the expiration of this or any subsequent agreement said non-member employer notifies the union in writing that it revokes such authorization." ***See* Exhibit GC-4, p. 28; Exhibit GC-6, p. 31.** Pursuant to these agreements, if Associated Contractors, Operating Engineers 537 and Laborers 309 agreed to extend the effective term of the existing agreement (or enter into a new agreement with a new effective term), Cedar Valley would be bound absent an affirmative showing of timely written revocation of authority.

The agreement signed by Cedar Valley existing between Cement Masons 544 and Associated Contractors provided that "[t]his contract shall be in effect from May 1, 1978 to April 30, 1981 and shall automatically renew itself thereafter from year to year unless either party hereto gives the other party no less than sixty (60) days notice by registered mail prior to the expi-

ration date expressing their desire to modify, amend or terminate this contract." ***See* Exhibit GC-9, p. 27.** Pursuant to this agreement, if Cedar Valley failed to make an affirmative showing of timely written termination, the effective terms of the 1978 agreement with Cement Masons 544 would be extended on a year-to-year basis.

The agreement signed by Cedar Valley existing between Teamsters' 371 and Associated Contractors was similar to the those between Operating Engineers 537, Laborers 309 and Associated Contractors. The Teamsters' 371 agreement with Associated Contractors obligated employer signatories to subsequent agreements between the employer bargaining unit and the union. In essence, by signing this agreement Cedar Valley made Associated Contractors its bargaining representative with the authority to bind Cedar Valley to subsequent agreements. In the event that there were no new or modified agreements, the Teamsters' 371 agreement also bound Cedar Valley to the 1978 agreement as automatically renewed on a yearly basis. As with the other prehire agreements, the Teamsters' 371 agreement placed an affirmative obligation upon Cedar Valley to formally terminate its relationship with the union and Associated Contractors. Barring satisfactory formal termination, Cedar Valley would remain obligated to either additional agreements or the automatically renewed 1978 prehire agreement.

2) Analysis of Cedar Valley's Arguments

a) Decertification

In the previous section the Court found that the decertification of the Waterloo unions did not impact the relationship

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By terms of the agreements, Cedar Valley became an "additional signatory employer party to this Agreement."

between Cedar Valley and the complaining unions. The Court finds that the viability and enforceability of the controlling agreements is in no way impaired by the decertification of the Waterloo unions. Therefore, this argument requires no more attention and the Court will focus on the two remaining arguments as to the validity of the Quad City Agreements.

b) The Lack of an Ongoing Relationship

Cedar Valley argues repeatedly in its brief that the lack of a continuous relationship between Cedar Valley and the complaining unions somehow cuts against the validity of the Quad City Agreements during 1989. The implicit reasoning behind this argument is that contractual obligations eventually expire if ignored, unused or unenforced. However, no authority supports such a conclusion. To the contrary, the ALJ, supported by substantial evidence, found that Cedar Valley was bound to the Quad City Agreements, either through automatic renewal or successive agreements between the complaining unions and Associated Contractors, at the time in question.

The record supports the ALJ's finding that, as to Cement Masons 544, Cedar Valley "is bound by the automatic renewal language of its collective bargaining agreement . . .." **Decision of the ALJ, p. 15.** Nothing in the record supports a conclusion that Cedar Valley gave the Cement Masons 544 the formal notice of termination required by the 1978 Quad City Agreements. Don Hainline, a business agent for Cement Masons 544 testified that Cedar Valley had never terminated the agreement in writing. **(Tr. 512).** Cedar Valley, having signed an agreement that clearly obligated it to affirmatively and formally terminate the agreements with Cement Masons 544 at least sixty days prior to renewal, cannot fail to so terminate and then complain of enforcement.

The ALJ also found that Cedar Valley was bound to successive agreements between Associated Contractors, Operating Engineers 537 and Laborers 309 by virtue of the Quad City Agreements signed by Cedar Valley in 1978. Again, Cedar Valley argues that the lack of a continuing relationship between itself and the complaining unions makes the ALJ's finding tenuous. However, we find no link between periods of inactivity among the parties and the enforceability of the agreements. Rather, the decisive issue is whether Cedar Valley affirmatively, and in compliance with the terms of the 1978 agreements, revoked Associated Contractor's authority to bind it to successive agreements.

In holding against Cedar Valley, the NLRB also adopted the ALJ's finding that "Respondent (Cedar Valley) signed collective bargaining agreements with Operating Engineers 537 and with Laborers 309, and each contract contained an express commitment to abide by the terms of successor association agreements. Respondent never terminated this delegation of bargaining rights in the contractually prescribed manner . . . Respondent's obligation to be bound by successor agreements continued to the present." **Decision of the ALJ, p. 14-15.** The NLRB similarly adopted the ALJ's finding as to Cedar Valley's grant of bargaining authority found in the Teamsters' 371 1978 prehire agreement.[8] **Decision of the ALJ, p. 15.** Nothing in the record supports a conclusion contrary to the NLRB's or the ALJ's. There is no indication of, nor does Cedar Valley allege, formal termination or revocation by Cedar Valley of Associated Contractor's authority to bind it to successive agreements with Operating Engineers 537,

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[8] The ALJ also found, in the alternative, that Cedar Valley was bound to the 1978 prehire agreement between Teamsters' 371 and Associated Contractors by virtue of the automatic renewal clause. **Decision of the ALJ, p. 15.**

Laborers 309 and Teamsters' 371. In light of Cedar Valley's failure to formally terminate these agreements, and based upon the substantial evidence before the Board, in the form of the agreements, the Court refuses to alter or reject the NLRB's Decision and Order. Accordingly, the Decision and Order will be enforced as to successive agreements reached between Associated Contractors, Operating Engineers 537, Teamsters' 371 and Laborers 309.

c) The Time Gap Argument

In another tack to avoid the successive agreements between the Operating Engineers 537, Laborers 309 and Associated Contractor, Cedar Valley argues that no successor Association agreement had been executed during May 1989 to replace the previous contracts which expired on April 30, 1989.* Cedar Valley contends that in the time "gap" between the expiration date of the 1978 agreements and the successor agreements between Associated Contractor, Operating Engineers 537 and Laborers 309, Cedar Valley repudiated its relationship with the complaining unions.

The NLRB concluded that "[t]he record shows, however, that there was, in fact, no 'gap.'" Based upon testimony from officers of Operating Engineers 537 and Laborers 309, the

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* Cedar Valley advances a similar argument against any successive agreements involving Teamsters' 371. Cedar Valley argues that Teamsters' 371 and Associated Contractors did not sign a new association contract until August 23, 1989, while the argument is illusory. Cedar Valley ignores the fact that it was bound,without interruptions or gaps, to the 1978 agreement by virtue of automatic renewal absent timely notice of termination. There being no formal termination of this agreement, there was no time "gap" between valid association agreements. Further, as part of the 1978 prehire agreement signed by Cedar Valley, Associated Contractors was given authority to bind Cedar Valley to any subsequent agreements such as the agreement of August 23, 1989.

NLRB concluded that "new agreements were effective on the April 30, 1989, expiration of the old contracts. That these contracts may not have been formalized, printed, or mailed on May 1 does not make them any less binding for the purpose of finding a contractual continuum in this case. We conclude that there was no 'gap' during which the Respondent (Cedar Valley) could repudiate either of these agreements." **Decision and Order of the NLRB, p. 3.** Cedar Valley has argued various factual scenarios arguably supporting a conclusion contrary to the NLRB's. However, Cedar Valley has failed to show that the conclusion of the NLRB is not based upon substantial evidence. We find the testimony of the union officers to be substantial evidence supporting the NLRB's decision and are therefore compelled to affirm that decision.

C. IS RETROACTIVE APPLICATION OF DEKLEWA MANIFESTLY UNJUST?

"In this circuit, we defer to the Board's conclusion to apply a decisional rule retroactively unless the result would be manifestly unjust." ***Ryan Heating Co., Inc. v. N.L.R.B.*, 942 F.2d 1287, 1288-89 (8th Cir. 1991)** (citing ***N.L.R.B. v. W.L. Miller Co.*, 871 F.2d 745, 748 & n. 2 (8th Cir. 1989)**). A manifestly unjust application of ***Deklewa*** is determined by posing three questions:

> (1) whether the losing party relied on established Board policy when choosing the course of conduct that led to the unfair labor practices charge; (2) whether the Board abruptly changed that policy without clearly foreshadowing its intent to do so; and (3) the severity of the penalty imposed on the losing party.

***Ryan Heating*, 942 F.2d at 1289.**

Cedar Valley contends that it repudiated the pre-hire agreements because (1) it "had every right to believe" that the

decertification proceedings of the Waterloo unions terminated Cedar Valley's relationship with the complaining unions; and (2) that it could not have been aware that the Board would apply ***Deklewa*** so as to hold it liable under the 1978 Quad City Agreements. These arguments, however, fail to present "established Board policy," much less reliance on such policies. Cedar Valley has no where presented a clearly established policy of the NLRB leading to the conclusion that the decertification of one union necessarily implies the decertification of a sister union. Further, Cedar Valley could not have relied upon the Board's future application of ***Deklewa*** as an "established Board policy." Without showing reliance upon an "established Board policy," in necessarily follows that Cedar Valley cannot meet the second ***Ryan Heating*** factor of an unexpected, abrupt change in the relied upon established policy.

Having failed to meet the first two factors of ***Ryan Heating,*** the third factor, the severity of the penalty, loses any meaningful context in terms of manifest injustice. Without sufficient justification, Cedar Valley unilaterally repudiated viable agreements in 1989 in violation of ***Deklewa.*** This unilateral repudiation occurred despite the opportunity to formally terminate or repudiate prior to 1989. Within this factual context, we cannot say that the penalties imposed are so severe as to be manifestly unjust.

D. ALLEGED DISINTEGRATION OF ASSOCIATED CONTRACTORS

Cedar Valley alleges that Associated Contractors suffered a complete breakdown or disintegration before the expiration of the Quad City Agreements on April 30, 1989, thus frustrating the purpose of these agreements and invalidating any successor agreements. "[T]he continued viability of the Association is a condition precedent to the enforcement of

succeeding or renewed collective- bargaining agreements between the Association and the unions." **Petitioner's Brief, p. 37.** The NLRB, through the decision of the ALJ, held that "[n]eedless to say the fact that the number of employers who are members of the Association rises or falls or the fact that many members of the Association withhold bargaining authority from the Association is irrelevant." Decision of the ALJ, p. 15. Implicit within the NLRB's holding is the factual finding that Associated Contractors had not disintegrated or ceased to exist at the time of the 1989 successor agreements. The Board's finding as to the viability of Associated Contractors must be upheld if supported by substantial evidence. If so supported, the factual determination that Associated Contractors has not fragmented or disintegrated disposes of Cedar Valley's argument.[10]

The Court finds substantial evidence supporting the Board's conclusion that at no time did Associated Contractors cease to exist as an entity which could bind Cedar Valley. The record establishes that prior to the expiration of the 1978 Quad City Agreements, eleven of thirteen member employers of the association withdrew their bargaining rights from Associated Contractors. However, the record also contains

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[10] The 1978 Quad City Agreements signed by Cedar Valley were pre-existing agreements between the complaining unions and Associated Employers. By the terms of these agreements, Cedar Valley became obligated to extensions or future agreements between the Association and the complaining unions by virtue of either automatic renewal or Cedar Valley's grant of authority to Associated Contractors to enter into extensions or modifications of the controlling agreements. The record amply supports the Board's findings that Cedar Valley failed to formally terminate the 1978 agreements by the means required by the contracts. Therefore, Cedar Valley takes a different approach and attacks the viability of one of the parties to the original pre-hire agreements. This attack is predicated upon the assumption that Associated Contractors ceased to be a viable entity prior to April 30, 1989. Should this assumption prove false, Cedar Valley's attack must fail.

substantial evidence supporting the conclusion that Associated Contractors was, at all times, an ongoing, viable organization. For example, Melvin Downs, field representative and vice-president of Laborer's Local 309, testified that since 1978, Local 309 has had a successive agreement with Associated Contractors. **(Tr. 372).**

Mr. Downs also testified that in spite of various member employers withdrawing their bargaining rights from Associated Contractors there is a meaningful distinction between withdrawing bargaining rights and withdrawing membership entirely. **(Tr. 439).** Further, Mr. Downs indicated that some of the employers that withdrew bargaining rights from Associated Contractors did not withdraw as members. **(Tr. 437).** Harley Kittelson, president of McCarthy Improvement Company, an employer that withdrew its bargaining rights from Associated Contractors, testified without equivocation that McCarthy Improvement Company remained a member of Associated Contractors even after withdrawing its bargaining rights. **(Tr. 294).**

Jack Shadt, the business manager of Operating Engineers Local 537, testified that in 1989 the eleven employers that withdrew their bargaining rights signed an addendum to the Quad City prehire agreements between Associated Contractors and the complaining unions. **(Tr. 267).** Mr. Shadt stated that the group of employers that signed the addendum were "11 contractors, all members of the Rock Island Association (another name for Associated Contractors)." ***Id.*** (parenthetical added). Danny West, of Teamsters' 371, testified that the addendum served to modify the collective bargaining agreements of 1989 between the complaining unions and Associated Contractors. **(Tr. 542).** This addendum was signed by thirteen member employers of Associated

Contractors, including members who had withdraw their bargaining rights. Clearly, had these employers fully withdrawn as members of Associated Contractors signing the addendum would have been a meaningless gesture.

In spite of these facts, Cedar Valley concludes that "[n]othing in the record disputes that the association effectively disintegrated and ceased to effectively exist prior to negotiating the 1989 agreements which are the basis for the Board's Order." **Petitioner's Reply Brief, p. 14.** However, in light of the above substantial evidence, this Court cannot overturn the Board's finding that Associated Contractors remained, at all relevant times, a viable organization able to bind Cedar Valley.

Cedar Valley also seeks to analogize this action to Section 8(a) cases dealing with fragmentation of multi-employer associations. However, the cases cited by Cedar Valley either cut against a finding that would release Cedar Valley from its contractual obligations or are inapplicable. Cedar Valley relies on ***Charles D. Bonanno Linen Service v. N.L.R.B.*, 454 U.S. 404 (1982)**, in an effort to claim that fragmentation of a multi-employer association justified Cedar Valley's abrogation of the agreements. However, ***Bonanno*** dealt with the question of whether fragmentation of a multi-employer association was a "unusual circumstance" justifying a single employer's withdrawal from ongoing employer-union negotiations. ***Id.* at 412-17.** Further, the Court in Bonanno found that the interest in multi-employer unit stability is a major consideration in forcing an employer to bargain in compliance with collective bargaining agreements. ***See also Action Elec., Inc. v. Local Union No. 292*, 856 F.2d 1062, 1065 (8th Cir. 1988).** In this case, allowing Cedar Valley to repudiate the contracts on the mere assumption that Associated Contractors had ceased to exist can only encourage instability in multiemployer units

in the future. Cedar Valley's reliance on ***Seattle Auto Glass v. N.L.R.B.*, 669 F.2d 1332, 1336-37 (9th Cir. 1982)**, is also misplaced. As with ***Bonanno*, *Seattle Auto Glass*** dealt with the propriety of an employer withdrawing from a multi-employer unit during negotiations, not repudiation of finalized agreements.

Ultimately, the NLRB and the ALJ concluded that the size and composition of the association were irrelevant in light of Associated Contractor's continued viability and Cedar Valley failure to formally terminate the automatically renewed agreements or its grant of bargaining authority to Associated Contractors. Given the substantial evidence supporting the Board's conclusion, this Court is bound to affirm the decision of the NLRB.

E. THE 1978 AGREEMENT WITH TEAMSTER'S 371

The last argument advanced by Cedar Valley is that the ALJ, and thus the Board, erred in finding Cedar Valley bound to the 1989 successor agreement between Associated Contractors and Teamsters' 371. In support of this argument, Cedar Valley alleges that the 1978 pre-hire agreement signed by Cedar Valley did not bind it to any successor agreements entered into by Associated Contractors. Instead, Cedar Valley alleges that, at most, it was bound to the automatic yearly renewal of the 1978 agreement. The NLRB, through the ALJ, found that "the language of delegation of bargaining rights in the Teamsters 371 contract is not as clear as that in Operating Engineers 537 and Laborers 309 agreements, nevertheless the delegation is the logical consequence of Respondent's contractual commitment to be part of the multi-employer bargaining unit." **Decision of the ALJ, p. 15.**

The conclusions of the ALJ and NLRB called for interpretation of the 1978 agreement between Teamsters' 371 and

Associated Contractors. This interpretation of the controlling contract will be subjected to *de novo* review. ***See Litton Fin. Printing v. N.L.R.B.*, 111 5. Ct. 2215, 2223 (1991).** Upon an independent review of the record, the Court finds that the 1978 prehire agreement existing between Teamsters' 371 and Associated Contractors acted as a grant of bargaining authority to Associated Contractors to negotiate subsequent agreements binding Cedar Valley.

"In interpreting a labor contract, 'traditional rules for contractual interpretation are applied as long as their application is consistent with federal labor policies.'" ***D.E.W., Inc. v. Local 93, Laborers' Int'l of North America*, 957 F.2d 196, 199 (5th Cir. 1992)** (quoting ***United Paperworkers Int'l Union, AFL-CIO, CLC v. Champion Int'l Corp.*, 908 F.2d 1252, 1255-56 (5th Cir. 1990)** (citations omitted)). The traditional rules governing contract interpretation in this jurisdiction state that if the contract is unambiguous, then interpretation is a matter of effectuating the underlying intent of the parties "as garnered from the four corners of the document." ***Press Mach. Corp. v. Smith R.P.M. Corp.*, 727 F.2d 781, 784 (8th Cir. 1984); *see also Atkins v. Hartford Cas. Ins. Co.*, 801 F.2d 346 (8th Cir. 1986).** Whether a contract is ambiguous is a function of "the whole instrument and the natural and ordinary meaning of the language." ***Press Mach. Corp.*, 727 F.2d at 784.** Based upon the whole instrument and the language contained therein, the Court finds the 1978 Teamsters agreement unambiguously binds Cedar Valley to successor agreements negotiated by Associated Contractors.

The Preamble of the agreement defines the fundamental goal of the 1978 agreement as unity between multiple employers bargaining with the union. The agreement seeks to avoid the problem of "numerous separate labor agreements with dif-

fering standards of wages, hours and working conditions [which] in turn, would prevent contractors from competing for available work on the basis of like labor costs and would create inequities and inequalities among employees doing the same type of work in the same area." **Exhibit GC-9, p. 1.** The agreement avoids this problem by allowing employers to bargain as a single unit.

The Recognition Clause in the 1978 agreement is the means by which the "single bargaining unit" concept stated in the Preamble is actualized.

> The Conference (Teamsters) recognizes the Association as the bargaining agent for all Employers who have so authorized the Association for all work covered hereunder . . . Individual Employers who have not so authorized the Association shall, by becoming party to this agreement also become part of said multi-employer bargaining unit, and withdrawal therefrom may be accomplished only by written notice to the Conference (Teamsters), at least sixty (60), but no more than ninety (90) days prior to the date of expiration of this agreement or of any renewal period hereof (parenthetical added).

Exhibit GC-9, p. 2. Given the agreement's underlying theme of bargaining unity, the Court finds that the Recognition Clause is reasonably susceptible to only one interpretation: That any employer who signs the agreement "become[s] part of said multiemployer bargaining unit (Associated Contractors)" which, for the sake of employer unity, is capable of binding the signatory employer. Any other interpretation would render the primary purpose of the agreement inert.

Upon *de novo* review, the Court finds that the 1978 Teamsters agreement binds Cedar Valley to successor agreements negotiated by Associated Contractors. Accordingly, the Court finds that the decision of the NLRB as to the interpreta-

tion of the Teamsters agreement and that decision will be enforced.

IV. CONCLUSION

The Court finds that the Board's Decision and Order correctly applied the controlling law and is supported by substantial evidence. Therefore, the Decision and Order is AFFIRMED and this Court orders that it be enforced.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

DOR

302 NLRB No. 128

D—1960
Waterloo, Iowa

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CEDAR VALLEY CORP.

and

LOCAL UNION NO. 309, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL—CIO	Case 33—CA—8721
LOCAL UNION NO. 544, THE OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, AFL—CIO	Case 33—CA—8724
LOCAL 537, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL—CIO	Case 33—CA—8735
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS LOCAL 371, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL—CIO	Case 33—CA—8821

DECISION AND ORDER

On June 4, 1990, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response and a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[1] in light of the exceptions and briefs and has decided to affirm the judge's ruling, findings[2], and conclusions and to adopt the recommended Order.

In contending that it was not obligated to honor contracts with Operating Engineers Local 537 and Laborers Local 309, the Respondent argues, inter alia, that after expiration of their contracts on April 30, 1989, a successor collective-bargaining agreement was not signed by the Associated Contractors of Rock Island and Operating Engineers Local 537 until on or after June 5, 1989, and, that in the case of Laborers Local 309, no argument was signed until June 13, 1989. Thus, according to the Respondent, there was a "gap" between the April 30, 1989 expiration of the old contracts and execution of the new

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[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent implicitly has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

contracts. The Respondent argues that during this "gap" it repudiated any relationship with Local 537 and Local 309.[1]

The record shows, however, that there was, in fact, no "gap". Laborers' Local 309 Vice President Melvin Downs testified without contradiction that the Associated Contractors of Rock Island reached a new agreement with Laborers Local 309 prior to the April 30, 1989 expiration date of the old agreement, and that the new agreement was in effect on May 1. Downs explained that the new agreement was not proofread and printed until June 13. Jack Schadt of Operating Engineers Local 537 testified without contradiction that ratification of the new agreement between the Association and the Operating Engineers Local 537 occurred before the April 30 expiration date of the old contract. He also testified that he mailed the previously agreed-upon wage rates and fringe benefits to the heavy and highway contractors on June 5.

The Respondent does not contend that, when the parties agreed to new agreements prior to expiration of the old Laborers' and Operating Engineers' contracts, there were any unsatisfied conditions precedent to the operation of the new contracts. Thus, both the Operating Engineers' and Laborers' new agreements were effective on the April 30, 1989 expiration of the old contracts. That these contracts may not have been formalized, printed, or mailed on May 1 does not make them any less binding for the purpose of our finding a contractual continuum in this case. We conclude that there was no "gap" during which the Respondent could repudiate either of these agreements.

Teamsters Local 371 had an 8(f) contract with the Associated Contractors that was initially effective May 1,

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[1] The judge did not address this argument.

1977, until April 30, 1980, and which provided for automatic renewal annually unless termination or modification was sought by written notice of either party. Although the contract was modified after this initial period, the parties continued their contractual and bargaining relationship without interruption through 1989. The Respondent contends, however, that, on expiration of the April 30, 1989 contract, Teamsters Local 371 did not enter into a new contract with the Association until August 23, 1989, and that the Respondent had repudiated its relationship with this Union as early as August 1985.[4] We disagree with the Respondent's contention that it lawfully repudiated its relationship with Teamsters Local 371. If there were such a repudiation in August 1985, it would have occurred during the term of the then current contract. A party may not lawfully repudiate an 8(f) agreement during its term. *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d. Cir. 1988), cert. denied 109 S.Ct. 222 (1988). We note, also, that after Teamsters Local 371 contacted the Respondent in the summer of 1989 seeking to enforce the contract, the Respondent did not respond to it, let alone advise Local 371 that it had previously repudiated the relationship. Thus, the Respondent's present repudiation argument appears to be a makeweight and an afterthought.

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[4] The judge did not address these arguments.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cedar Valley Corp., Waterloo, Iowa, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. April 30, 1991

Dennis M. Devaney, Member

John N. Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER OVIATT, concurring.

I concur in the decision in this case with considerable reluctance. I agree that the Respondent failed properly to exercise its rights to terminate its 8(f) bargaining relationship. In addition, there certainly is no basis in law or in fact for the Respondent to claim that any union here was decertified as a result of an election held in another jurisdiction (Illinois) when these contracts applied in Davenport, Iowa.

I am concerned, however, about the fragmentation of the multiemployer bargaining unit by 1989 and the obligation of the Respondent to continue thereafter to be bound to the multiemployer contracts when only 2 of the original 13 contractors remained members of the Association. I believe that in a different context that might well be a reason not to require an employer to continue to honor its obligations under the multiemployer agreements. But here, the Respondent did not rely on this fragmentation when it refused to recognize the Unions or to abide by the contracts. Thus, the record reveals that when first confronted with the Unions' demands to apply the contracts, the Respondent did not specify fragmentation of the multiemployer unit as a reason for its refusal to apply the contracts. In these circumstances, I agree with my colleagues that the Respondent violated Section 8(a)(5).

Dated, Washington, D.C. April 30, 1991

Clifford R. Oviatt, Jr Member

NATIONAL LABOR RELATIONS BOARD

JD-106-90
Waterloo, Iowa

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CEDAR VALLEY CORP. and LOCAL UNION NO. 309, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO	Case 33-CA-8721
CEDAR VALLEY CORP. and LOCAL UNION NO. 544, THE OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, AFL-CIO	Case 33-CA-8724
CEDAR VALLEY CORP. and LOCAL 537, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL—CIO	Case 33-CA-8735
CEDAR VALLEY CORP. and TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS LOCAL 371, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO	Case 33-CA-8821

Judith T. Poltz, Esq., of
Peoria, Illinois, for the General Counsel.
Kevin J. Visser, Esq.,
Robert E. Konchar, Esq.,
Mark J. Herzberger, Esq.,
of Cedar Rapids, Iowa, for Respondent.
Melvin Downs, of Colona,
Illinois, for Laborers 309.
Don Hainline, of
Rock Island, Illinois for Cement Mason 544.
Barry J. Levine, Esq., of
St. Louis, Missouri, and
Jack Shadt, of Rock Island, Illinois,
for Operating Engineers 537.
Denny West, of Rock Island,
Illinois, for Teamsters 371.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge: On June 6, 1989, June 8, 1989, June 21, 1989, and September 1, 1989 charges were filed against Cedar Valley Corp., herein Respondent, by Laborers 309, Cement Masons 544, Operating Engineers 537, and Teamsters 371, respectively.

Thereafter, on October 18, 1989, the National Labor Relations Board, by the Regional Director for Region 33, ordered that Previously issued Complaints in 33-CA-8721, 33-CA-8724, 33-CA-8735, and 33-CA-8821, be consolidated for trial. The Consolidated Complaints allege that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, herein the Act, when it refused to abide by or honor its current collective bargaining agreements with the four charging party unions and when it unlawfully withdrew recognition from the four charging Party unions during the term of the aforesaid collective bargaining agreements. In all four instances the collective bargaining agreements in question were Section 8(f) agreements.

Respondent filed Answers to the Complaints in which it denied that it violated the Act in any way.

A hearing was held before me in Rock Island, Illinois, on January 18, 1990 and in Davenport, Iowa, on February 20 and 21, 1990.

I find that the General Counsel has Proved its case and will recommend an appropriate remedy.

Based upon the entire record in this case, to include post hearing briefs filed by the General Counsel and Respondent,

and based upon my observation of the witnesses and their demeanor, I hereby make the following:

Findings of Fact

I. Jurisdiction

Respondent is, and has been at all times material herein, an Iowa corporation with an office and place of business located in Waterloo, Iowa. It is in the business of concrete paving contracting and has, *inter alia*, engaged in a Paving Project which involves Interstate Route 280 in Scott County, Iowa.

Respondent, during the past twelve months, which period is representative of all times material herein, in the course and conduct of its business operations, purchased and caused to be transferred and delivered to its various projects at points within the state of Iowa, supplies and materials valued in excess of $50,000 which were transported to said projects and locations directly from States other than the State of Iowa.

Respondent admits and I find that it is, and has been at all times material herein, an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

II. The Labor Organizations Involved

Laborers 309, Cement Masons 544, Operating Engineers 537, and Teamsters 371 are now, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Introduction*

All sides agree that the principal case that all parties are looking at for guidance is the Board's decision in *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987), enforced *sub nom., Iron Workers Local 3* v. *NLRB*, 843 F.2d 770 (3d Cir 1988), cert. denied, 107 S. Ct. 222 (1988). In *Deklewa* the Board addressed in great detail the entire subject of Section 8(f) contracts in the construction industry.

Suffice it to say, at this juncture, that the Board held, in part, at page 1385 that "when parties enter into an 8(f) agreement they will be required, by virtue of Section 8(a)(5) and Section 8(b)(3), to comply with that agreement unless the employees vote, in a Board-conducted election, to reject (decertify) or change their bargaining representative. Neither employers nor unions who are party to 8(f) agreements will be free unilaterally to repudiate such agreements."

Further, the Board held at p. 1386 that I " . . . upon the contract's expiration, the signatory union will enjoy no majority presumption and either party may repudiate the 8(f) relationship."

B. *Factual Setting*

In 1978 Respondent signed collective bargaining agreements with the four charging party unions which are based in the Quad Cities of Illinois and Iowa. Three of these agreements—those of Teamsters 371, Operating Engineers 537 and Laborers 309—provided that Respondent agreed to be bound by successive labor agreements with the respective unions negotiated by the Associated Contractors of Rock Island, absent timely notice withdrawing such bargaining authority.

The fourth contract, with Cement Masons 544, provided for automatic renewal of the contract, absent timely notice terminating the agreement.

Respondent is based in Waterloo, Iowa and returned to the Quad Cities area again for another project in 1981. At that time it honored the collective bargaining agreements with the Quad Cities local unions representing Operating Engineers 537, Laborers 309 and Teamsters 371, and signed a new agreement with Cement Masons 544 containing the same automatic renewal language.

In 1985 Respondent performed its next project in the Quad Cities area. When the Teamsters 371 Business Agent contacted Respondent concerning this job, Respondent asserted it had no collective bargaining agreement with that union. Teamsters 371 took no further action against Respondent at that time. The Cement Masons 544 Business Agent visited the jobsite; but because the job was already half done and because he had no workers available to refer to Respondent for hiring, he took no action against Respondent. There is no evidence that Respondent had any contact with Cement Masons 544, Operating Engineers 537 or Laborers 309 at that time, and there is no evidence to show that either Operating Engineers 537 or the Laborers 309 were aware of the project at that time.

Respondent returned to the Quad Cities area for a fourth project in 1989. The project was awarded to Respondent shortly after final bidding closed on April 25, 1989. During May and June, officers and business agents for Laborers 309, Cement Masons 544 and Operating Engineers 537 called and wrote to Respondent demanding that it comply with the terms of the successive labor agreements to which Respondent had agreed to be bound; or, in the case of Cement Masons 544, to

the automatically renewed 1981 labor agreement. During June and July, a Teamsters 371 Business Agent called and visited Respondent's jobsite and made the same type of demand to an individual who had identified himself as a supervisor employed by Respondent.

Respondent's response to all of the four unions was that by virtue of certain 1983-84 NLRB Region 18 representation cases, entailing sister local unions based in Waterloo, Iowa and vicinity, Respondent had no collective bargaining agreements with the four charging party unions.

Respondent, as noted above, is an Iowa corporation engaged in the business of concrete paving and general contracting in the construction of roads. Its offices are in Waterloo, Iowa. At all times material herein, until his retirement on December 15, 1989, Lawrence Bogue served as Respondent's executive vice president. For the last two years, Steven Jackson served as Respondent's President, in 1978 he served as Respondent's paving superintendent, and in 1981 he served as Respondent's vice president, Paving superintendent and project superintendent on a job in Scott-County, Iowa. At all times material herein, Larry Clark served as Respondent's Treasurer.

Prior to 1983, Respondent was party to collective bargaining agreements with labor organizations based in Waterloo or Des Moines, Iowa and vicinity, representing employees in the crafts of operating engineers, laborers, cement masons and teamsters. These labor organizations were: Operating Engineers 234, Cement Masons 818, Iowa Laborers District Council, and Teamsters 844. These labor organizations represented Respondent's employees employed at its jobsites in Waterloo, Iowa and vicinity. It is undisputed that the geographic jurisdiction of these labor organizations and the scope

of their respective labor agreements did not extend into Scott County, Iowa or the Quad Cities.

During 1983-84, each of the four Waterloo-Des Moines based Labor Organizations was party to a representation case before Region 18 of the Board, resulting either in decertification, disclaimer or withdrawal of the petition in which representation was claimed. As a result Operating Engineers 234, Cement Masons 818, Iowa Laborers District Council, and Teamsters 844 do not represent Respondent's employees. It is undisputed that the four Charging Party Unions were not parties to, and had no notice of, the representation proceedings in the Board's Region 18, which is located in Minneapolis, Minnesota.

Although based in Waterloo, Iowa, Respondent served as general contractor and paving contractor for four highway construction jobs in Scott County, Iowa. These jobs occurred in 1978, 1981, 1985-86, and 1989 and were referred to during the hearing and in this decision as the Mt. Joy Road, Division St I, Division St. II, and I-280 jobs, respectively. These are the only four jobs which Respondent performed within the geographic jurisdiction of the Charging Party Unions and within the geographic scope of their respective collective bargaining agreements.

The four Charging Parties are labor organizations based in Rock Island, Illinois. Rock Island is one of four neighboring cities on the Mississippi River which are collectively referred to as the "Quad Cities", consisting of Rock Island and Moline in Illinois and Davenport and Bettendorf in Iowa. The city of Davenport is located in Scott County, Iowa.

Jack Schadt is the current president and business manager of Operating Engineers 537. Only the business manager has

authority to negotiate collective bargaining agreements, although business agents acting under his direction have authority to sign such agreements. From 1975 until 1988, Schadt served on the Executive Board of Operating Engineers 537. The Executive Board reviews the expenditures of money and the policies of the local union. Schadt served also' as an apprentice instructor and coordinator for three years, and has been a member of the union since 1961.

In 1978 Don Kenny was business manager of Operating Engineers 537, and George Foster Hutcheson, often called "Hutch", served as a business agent. In 1980 George Foster Hutcheson became business manager, and served in this capacity until his retirement in 1986 or 1987. Thereafter, he moved to the southwest, and his brother, Jack Hutcheson, served as president and business manager until he was defeated by Schadt in an election for this position.

Operating Engineers 537 business managers, business agents and officers, and George Foster Hutcheson in particular, never represented any other labor organization in bargaining with employers. Specifically Operating Engineers never represented the other three Charging Party Unions in this case.

For the last two years and at present, Dan Adams has been and is, the current business representative of Laborers 309, and Melvin "Butch" downs has been, and is, the vice president and field representative, Hone of the current officers and agents of laborers 309 have been in office for more than two years, but the office secretary has served for 11 years.

Don Hainline is the business agent for Cement Masons 544, and has served in this capacity for 20 years.

Denny West is, and has been, the vice president and business agent for Teamsters 371 since 1985.

C. Mt. Joy Road Job (1978)

In 1978 Respondent served as the general contractor and paving contractor for a project entailing paving Mount Joy Road, an Iowa county road near the Davenport municipal airport. The job contract was signed on April 13, 1978, and provided for 65 working days, to be completed by October 20, 1978. The contract price was $617,161.06.

On or about June 26, 1978, Lawrence Bogue, on behalf of Respondent, signed a collective bargaining agreement with Operating Engineers 537. The agreement is captioned "Heavy and Highway Agreement", and recites at the outset that it is an agreement between the "ASSOCIATED CONTRACTORS with headquarters in Rock Island, Illinois, and/or by individual signers who are engaged in the construction industry as described herein, hereinafter referred to as the Contractor, and the INTERNATIONAL UNION OF OPERATING ENGINEERS, local 537, hereinafter referred to as the Union."

The agreement concludes, just above Bogue's signature, with the following language, which is the basis for the General Counsel and Charging Party position that Respondent is bound to successive collective bargaining agreements negotiated between the Associated Contractors of Rock Island and Operating Engineers 537:

> "The undersigned employer hereby becomes a signatory employer to this agreement between the ASSOCIATED CONTRACTORS and the INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 537.
>
> The undersigned employer signatory here to who is not a member of the said Association agrees to be

> bound by any amendments, extensions or changes in this Agreement agreed to between the Union and the Association, and further agree to be bound by the terms and conditions of all subsequent contracts negotiated between the Union and the Association unless ninety (90) days prior to the expiration of this or any subsequent agreement said non- member employer notifies the Union in writing that it revokes such authorization. Further, said non-member employer agrees that notice served by the Union upon said Association and Mediation Services for re-opening, termination or commencement of negotiations shall constitute notice upon and covering the non-member employer signatory hereto."

At no time did Respondent serve Operating Engineers 537 with notice of termination of the 1978 agreement or with notice of withdrawal of the delegation of bargaining authority set forth above. Operating Engineers 537 received the Associated Contractors of Rock Island's negotiated successive collective bargaining agreements thereafter. The most recent of these is effective by its terms from May 1, 1989 through April 30, 1992.

The geographic jurisdiction of the agreement includes Scott County, Iowa (except for certain river work not entailed in the present case), and does not overlap with the geographic jurisdiction of the Operating Engineers Sister local union, i.e., Operating Engineers 234, based in Waterloo, Iowa.

On or about June 26, 1978, Bogue signed, on behalf of Respondent, a collective bargaining agreement with Laborers 309. The Laborers 309 collective bargaining agreement is captioned "Agreement Between Laborers' International Union of North America, Local Union No. 309 Affiliated with AFL-CIO and Associated Contractors Covering Heavy & Highway

Construction Work in Rock Island and Mercer Counties in Illinois and Scott County, Iowa."

On the last page of the Laborers 309 collective bargaining agreement, just above Lawrence Bogue's signature, the following clause appears, which is the basis for the General Counsel's and Union's assertion that Respondent is bound to successive contracts negotiated between the Associated Contractors of Rock Island and Laborers 309:

> "The undersigned Employer hereby becomes a signatory Employer to this Agreement between the Associated Contractors and the Laborers International Union of North America, Local Union Ho. 309, AFL-CIO.
>
> The undersigned Employer signatory hereto who is not a member of the said Association agrees to be bound by any amendments, extensions or changes in this Agreement, and further agree to be bound by the terms and conditions of all subsequent contracts negotiated between the Union and the Association unless ninety (90) days prior to the expiration of this or any subsequent Agreement said nonmember Employer notifies the Union in writing that it revokes such authorization. Further, said nonmember Employer agrees that notice server by the Union upon said Association and Meditation Services for reopening, termination or commencement of negotiations shall constitute notice upon and covering the nonmember Employer signatory hereto."

It is undisputed that Respondent never served Laborers 309 with notice of termination of the collective bargaining agreement or with withdrawal of the bargaining authority delegated to the Associated Contractors of Rock Island. The Associated Contractors of Rock Island and Laborers 309 negotiated successive collective bargaining agreements, the most recent of which is effective by its terms from May 1, 1989 to April 30, 1992.

On July 20, 1978, Stephen Jackson signed, on behalf of Respondent, a collective bargaining agreement with Cement Masons 544. Article XVII, Duration and Termination, of that agreement provides:

> "This contract shall be in effect from May 1, 1978 to April 30, 1981 and shall automatically renew itself thereafter from year to year unless either party hereto gives the other party no less than sixty (60) days notice by registered mail prior to the expiration date expressing their desire to modify, amend or terminate this contract."

Just above Jackson's signature, the agreement provides:

> "The undersigned contractor, or association of contractors, does hereby become an additional signatory employer party to this Agreement."

On or about July 5, 1978, Larry Clark, Respondent's Treasurer, signed a participation agreement providing that Respondent would make payments into the health and welfare fund created by a trust agreement between the Illinois Conference of Teamsters and various employer associations. The participation agreement recited that Respondent had entered into a collective bargaining agreement with Teamsters 371. On or about July 17, 1978, Clark signed a similar participation agreement pertaining to the Teamsters 371 Pension Fund maintained by the Central States Southeast and Southwest Pension Fund. This agreement was signed also by a representative of Teamsters 371. On August 25, 1978, Clark signed the actual collective bargaining agreement to which these participation agreements referred.

The collective bargaining agreement which Respondent signed with Teamsters 371 is captioned "Agreement Between Teamsters Union Local No. 371 and Associated Contractors of Rock Island Covering Heavy Construction in Rock Island and

Mercer County in Illinois and Scott County in Iowa." The text of this agreement is the same as that negotiated between the Associated Contractors of Illinois and the Illinois Conference of Teamsters, except that the contract signed by Respondent specifically includes Scott County, Iowa and certain Illinois counties.

By virtue of certain language in the Teamsters 371 contract which Respondent signed in 1978, Respondent bound itself to comply with future contracts negotiated by the Associated Contractors of Rock Island. The language in question is found at the recognition clause, and is supplemented by recitations in the preamble. The preamble recites that the parties recognize that collective bargaining by and between local unions and individual contractors would create "numerous separate labor agreement with differing standards of wages, hours and working conditions", and "in turn would prevent contractors from competing for available work on the basis of like labor costs and would create inequities and inequalities among employees doing the same type of "work in the same area." The preamble further recites that "In order to avoid such undesirable circumstances and achieve the stabilization of wage rates and working conditions . . . the parties desire and intend this to be a multi-employer, multi-union negotiated agreement established for the classes of employees involved . . . regardless of the contractor for whom they work or the Local Union which represents them."

The recognition clause of the same contract provides that the conference of local unions recognizes the multi-employer association as the bargaining agent for all employers who have so authorized the association, and continues:

> "Individual Employers who have not so authorized the Association shall, by becoming party to this agreement

> also become part of said multi-employer bargaining unit, and withdrawal therefrom may be accomplished only by written notice to the Conference, at least sixty (60), but no more than ninety (90) days prior to the date of expiration of this agreement or, of any renewal period hereof. Notice to the Association, wherever notice is required herein, shall constitute notice to each and all members of the multi- employer bargaining unit."

Even if the above language did not bind Respondent to successive contracts between the Associated Contractors of Rock Island and Teamsters 371, Respondent is bound nevertheless by the automatic renewal language of the Teamsters 371 contract which it signed in 1978:

> "This Agreement shall become effective as of the 1st day of May 1977, and shall remain in full force and effect until the 30th day of April 1980, and each year thereafter, unless written notice of termination or desired modification is given at least sixty (60) days, but no more than ninety (90) days prior to the expiration date by either of the parties hereto."

At no time did Respondent serve Teamsters 371 with notice of withdrawal from the multi-employer bargaining unit, termination of the delegation of bargaining authority implicit in its participation in the multi-employer bargaining unit or termination of the 1978 collective bargaining agreement.

Respondent's 1978 job paving Mount Joy Road was not covered by the Davis Bacon Act. Respondent admitted, and the record shows, that Respondent paid wages and health and welfare benefit contributions in accordance with its obligations under the collective bargaining agreements with the Charging Parties.

Respondent maintained no payroll records or personnel records which would show its method of obtaining labor for

the 1978 job. The record indicates, however, that Respondent complied with the collective bargaining agreements with the Charging Parties. First, Respondent had no record of grievances filed alleging failure to comply with the Charging Parties' labor agreements. The Operating Engineers 537 agreement provides for exclusive referral, and its members would be subject to intra-union discipline if they were to accept employment from a signatory contractor without going through the referral procedure. Further, Health and Welfare records indicate that Respondent hired three individuals who were members of Operating Engineers 537, and none were disciplined for such misconduct. Moreover, although Respondent employed five individuals in this craft who apparently were from its Waterloo operation, Respondent made health and welfare and pension contributions on behalf of these individuals as well to the Operating Engineers 537 funds, with arrangements for the subsequent transfer of such funds to the corresponding Waterloo local funds, in accordance with normal procedures and the Operating Engineers 537 contract.

Respondent used the Laborers 309 referral hall, for the referral slips are in evidence, along with the health and welfare records showing payments on behalf of employees in this craft. Respondent employed its laborers workforce through referral by Laborers 309. Employees in this craft who were not referred by Laborers 309 may have been "key men" permitted by the contract, or workers in excess of those which Laborers 309 was able to supply. Nevertheless, Respondent paid health and welfare contributions on behalf of *all* laborer employees to the Laborers 309 fund, as required by the Laborers 309 contract.

Cement Masons 544 had no records available of 1978 referrals or fund contributions because of a fire in its offices which destroyed such records. Nevertheless, Respondent admitted that it substantially complied with the requirements of its 1978 collective bargaining agreement with Cement Masons 544.

Records maintained by Teamsters 371 indicate that Respondent made pension payments to the Central States Pension Fund in accordance with the requirements of the Teamsters 371 contract, and that Respondent employed at least one driver who was a member of Teamsters 371. The Teamsters 371 contract requires hiring exclusively by referral by the Union, but allows contractors to bring in 20 percent of its workforce from other areas.

D. *Division St. I Job (1981)*

Respondent returned to the Quad Cities in 1981 to serve as general contractor and paving contractor for a project entailing paving Division Street in Davenport. The job entailed an estimate of 80 working days, with 113.5 actual working days during 1981. The job was to commence on approximately April 1, 1981, concluded on or about December 8, 1981, and entailed a contract price of $1,351,560.59.

Bogue and Jackson represented Respondent at a pre-job conference which occurred at the Ramada Inn in the Quad Cities. Representatives of the various craft unions were present, including Don Hainline for Cement Masons 544. On July 21, 1981, Jackson signed the Cement Masons 544 then-current collective bargaining agreement. This collective bargaining agreement contained the same automatic renewal language as the Cement Masons 544 collective bargaining agreement which Respondent had signed in 1978.

Respondent did not sign any further agreements with the other Charging Parties. Nevertheless, Respondent again complied with the terms of the agreements which it had signed in 1978, as updated by successor agreements. Specifically, Respondent used the Operating Engineers 537 referral hall to obtain part of its workforce in this craft, and paid health and welfare contributions on behalf of all its employees in this craft to the Operating Engineers 537 trust funds, with appropriate subsequent transfers of funds to the home local union trust funds on behalf of those Waterloo employees who had authorized such transfers.

Similarly, Respondent made payments to the Laborers 309 health and welfare fund on behalf of all its employees in this craft. Several of its laborers were in fact members of Laborers 309. In light of the exclusive hiring hall procedures under the Laborers 309 collective bargaining agreement and the fact that a member of Respondent's laborers' workforce consisted of members of Laborers 309 in good standing, it is a reasonable inference that these workers were referred in accordance with the referral and hiring provisions of the contract. Referral records for 1981 had existed, but were lost prior to the instant litigation.

Respondent hired two-thirds of its cement masons through referral by Cement Masons 544, and paid health and welfare contributions on behalf of all its employees in this craft to the Cement Masons 544 trust fund. Both the referral records and benefit payment records are in evidence. Insofar as Cement Masons 544 referred workers before Respondent signed the 1981 labor agreement, such requests for employees and referrals occurred pursuant to the 1978 labor agreement, which had automatically renewed and was in effect until superseded by Respondent's 1981 agreement.

Finally, Respondent paid health and welfare contributions on behalf of its drivers to the Teamsters 371 trust fund, and hired at least some of its drivers through referral by Teamsters 371, in accordance with Teamsters 371's contractual hiring and referral procedure.

In 1982, long after the 1981 job was completed, both Laborers 309 and Operating Engineers 537 continued to apprise Respondent of modifications of and successor agreements to their respective area labor agreements, and Respondent maintained this correspondence in its files to the date of the hearing. Cement Masons 544 and Teamsters 371 provided similar information during 1981, which Respondent again retained to the present.

E. *Division St. II Job (1985)*

In 1985 Respondent served as general contractor and paving contractor for a job referred to in this litigation as the Division Street II job. The job, covered by the Davis-Bacon Act, entailed paving 2.37 miles of roadway, for a contract price of $711,633.83. The job began with excavation performed by a subcontractor, Foley, who commenced work during the week ending August 10, 1985, and who worked continuously until the week ending November 23, 1985. Foley resumed and concluded the job during April 1986. Foley is a well- known excavation contractor in the Quad Cities, and signatory to collective bargaining agreements with each of the Charging Parties. Respondent performed actual paving on this project only during a six week period in October and November 1985, when it employed employees in all four of the crafts represented by the Charging Parties. The entire project entailed a total of approximately 7,989.5 hours, of which Respondent's employees performed approximately 52.7 percent. The remaining hours were performed by other contractors, principally Foley.

When Respondent performed this project, it gave no notice to any of the our Charging Parties, and had no contact whatsoever with Operating Engineers 537 or Laborers 309.

Don Hainline, president of Cement Masons 544, visited the jobsite in 1985. He had heard from a member that a job was ongoing at that time, and he went to check the job pursuant to the member's request. Hainline found that Respondent was indeed performing work entailing the cement masons craft. Because the job was already "half done", the remaining work did not entail a substantial job and because Hainline had no employees available to refer to Respondent for employment, he took no action against Respondent. This inaction by Cement Masons 544 does not constitute a waiver of its contract rights since the Union had good reasons for its inaction and the waiver, if any, is not clear and unmistakable.

Teamsters 371 business agent Denny West took office in 1985. West testified that he learned that Respondent was performing the Division Street II job from Don Hainline. West had a conversation with Lawrence Bogue on or about October 11, 1985. On that date, West wrote Respondent a letter stating:

> Dear Sir:
> Per our conversation on October 11, 1985 I am asking for what prove (sic) you have that you are not signed to a contract. Please submit all your prove (sic) to me or you are in violation of our standards.
>
> Very truly yours,
> TEAMSTERS LOCAL UNION NO. 371
> Denny West
> Vice President and
> Business Representative

Respondent did not respond to this letter. West testified that he visited the 50 jobsite sometime after he wrote this letter, and found only Foley's crew at work. He, therefore, took no further action against Respondent. I specifically credit the testimony of Hainline and West. Their demeanor was such that I found them to be honest witnesses'.

A waiver of rights by a union must be clear and unmistakable. *Metropolitan Edison Co.* v *NLRB*, 460 US 693 (1983). There was no clear and unmistakable waiver in this case by the action of Teamsters 371 and Cement Masons 544 regarding the 1985 Division Street II job.

F. *I-280 Job (1989)*

On or about April 25, 1989, the Iowa Department of Transportation closed the final bidding on a project to pave a 7.8 mile stretch of Interstate 280 within Scott County, Iowa. Respondent was the successful bidder. Respondent and the Iowa Department of Transportation signed the job contract on May 19, 1989. The project entailed a contract price of $4,190,393.72. In the performance of this project, Respondent employed employees in all four of the crafts represented by the Charging Parties.

Jack Schadt of Operating Engineers 537 learned that Respondent was awarded the contract from the Dodge Reports, which is a service which lists contracts. He called Respondent and left messages with Respondent's office secretary, but he received no responses to these inquiries. On or about June 5, 1989, he called again, and this time he reached Steve Jackson. Schadt told Jackson that his union had a contract with Respondent, and asked to meet to discuss arrangements for the job. Jackson told Schadt that he didn't think Respondent had a contract with the Union, that

Respondent had repudiated or "backed out of" the contract in 1983. Schadt offered to send Respondent a copy of the signature page of the contract which Respondent signed in 1978.

By letter dated June 7, 1989, Jackson responded on behalf of Respondent, asserting again that no contract existed. Jackson enclosed a copy of a letter dated September 1983 which Respondent had sent to Des Moines-based Operating Engineers 234. In the 1983 letter, Respondent had asserted it would not meet with Operating Engineer 234 in light of Operating Engineer 234's withdrawal of a representation petition it had filed with the Board's Region 18. Jackson stated, in his cover letter to Schadt:

> "As you can see from the facts and events detailed in this letter, the International Union of Operating Engineers does not represent Cedar Valley Corp. Employees.
>
> In accordance with the wishes of our employees, we have not and will not recognize any labor union as a collective bargaining representative of our employees absent a valid election certifying the same."

Schadt and Jackson exchanged further letters reiterating their respective positions.

Laborers 309 learned that Respondent was awarded the 1989 I-280 job also through the Dodge Reports. By certified letter dated May 8, 1989, Laborers 309 business manager Dan Adams requested a pre-job conference pursuant to its contract with Respondent Steve Jackson responded on behalf of Respondent, denying the existence of a contract. Laborers 309 sent Respondent a copy of the contract signed by Respondent in 1978. Jackson and Adams exchanged further correspondence, both directly and through their attorneys, until June 19, 1989. Neither party changed position.

Respondent had only one argument in response to the Laborers 309 claim of the existence of a contract: that in 1984 the Iowa Laborers District Council lost a representation election in a proceeding before the Board's Region 18. Laborers 309 is not a member of the Iowa Laborers District Council. Respondent sent Laborers 309 a copy of the Certification of Results of the election. Jackson stated in one letter to Laborers 309, ". . . it remains our position that no labor organization represents our employees. Specifically, the lapse of more than 10 years together with an intervening decertification election is, we believe, strong evidence in support of that position."

By certified letter to Respondent dated May 8, 1989, Don Hainline requested a pre-job conference on behalf of Cement Masons 544. Jackson replied by letter, denying existence of a collective bargaining agreement. The parties reiterated their positions in further correspondence between May 8 and June 19, with neither party changing position. Hainline sent Respondent a copy of the collective bargaining agreement which Respondent had signed in 1981.

Respondent raised only one argument in response to the Cement Masons 544 claim of the existence of a contract: that in 1984 Cement Masons 544's sister local, Cement Masons 818, based in Iowa, had lost a representation election in proceedings on a decertification petition before the Board's Region 18. Jackson sent Hainline a copy of the Certification of Results of this election and asserted, ". . . it remains our position that no labor organization represents our employees. Specifically, the lapse of more than seven years together with an intervening decertification election is, we believe, strong evidence in support of that position."

Denny West of Teamsters 371 learned about Respondent's project from Laborers 309. He called Respondent's offices, and visited the jobsite three times in the spring and summer of 1989. He received no response to his telephone messages. On his first two visits, he knocked on the door of the jobsite trailer; although he could hear voices inside, no one opened the door, and West left. On West's third visit, which occurred in July, he simply entered the trailer without knocking. A man in the trailer said he was a supervisor for Respondent. West introduced himself, showed the supervisor the contract which Respondent had signed and the collective bargaining agreement then in effect with the Associated Contractors of Rock Island, and a copy of his business card. The supervisor said he would send these documents to Respondent's attorney. Respondent did not reply to Teamsters 371.

Respondent completed all work on this I-280 job prior to the opening of the hearing in this case.

G. *Legal Analysis*

Respondent raises a number of defenses. It alleges that it should not be bound by the contracts with the four charging party unions because when it signed the contracts in 1978 and 1981 it did so on a "single project" basis only, i.e., it signed the contracts and agreed to be bound but only for the duration of the job then in progress, namely, the Mount Joy job and the Division Street I job. I don't agree. I don't credit the testimony of either Lawrence Bogues or Stephen Jackson. Neither man was credible on this point. If these were going to be "single project" agreements then that would have been written into the contract or noted in some way. It wasn't. I credit the testimony of the witnesses for the General Counsel who credibly testified that Respondent signed the contracts and did not in any way indicate that they considered themselves bound to

the contract only for the duration of the project then under way. The Charging Party Unions even presented samples of "single project" contracts they have entered into and all of those contracts are clear of their face that the contracts are for a single project or a limited duration of time.

Respondent also claims that because its employees in Iowa effectively removed sister locals of the four charging party unions as their representatives for purposes of collective bargaining that, therefore, the four Charging Party Unions were likewise decertified and Respondent's contractual obligations to those four charging party unions terminated. The four Charging Party Unions were not parties or even notified about the Region 18 litigation regarding their sister locals. I reject this defense. A decertification of Union X does not decertify Union Y. If grounds exist to repudiate a contract with Union A or grounds exist to justify a refusal to bargain with Union A it does not follow that an employer may repudiate a contract with Union B or refuse to bargain with Union B.

The Board has addressed the question of whether an 8(f) employer is bound, by the terms of his original contract, to successor agreements or to the automatic renewal of the original contract. The Board has uniformly held that employers are bound to such successor contracts and automatically renewed agreements. When, for example, an employer signs a supplemental agreement whereby he consents to be bound to the area association agreement and to successor association agreements, the Board has stated that the employer is bound to successor agreements until he serves timely notice to terminate the agreement and the delegation of bargaining authority. *Nordpal Corporation d/b/a Twin City Garage Door Co.*, 297 NLRB No. 13 (1989) (slip op. pp. 1-2, n. 2); *W.B. Skinner, Inc.*, 283 NLRB 989 (1987). Similarly, even if the supplemental

agreement contains no automatic renewal language, but the master agreement has such a provision, the Board has stated that the employer is thereby bound to successive master agreements until he serves timely notice of contract termination. *Garman Construction Company*, 287 NLRB No. 12 (1987).

Further, the Board has stated that an employer's mere withdrawal of bargaining authority from the employer association does not terminate the obligation to abide by the current collective bargaining agreement, and does not cancel the automatic renewal language of the contract. *IBEW Local 532 (Brink Construction Co.)*, 291 NLRB No. 69 (1988), *Carthage Sheet Metal Company, Inc.*, 286 NLRB 1249 (1987).

When the 8(f) agreement expires and the employer has served timely notice of contract termination, nevertheless, the Board has held the designation of bargaining authority continues. That is, the Board has held that an employer is bound to successive agreements negotiated by the association until the employer withdraws bargaining authority from the association in a timely manner. *Reliable Electric*. 286 NLRB 834 (1987); *Kenhart Plumbing, Inc.*, 285 NLRB 612 (1987); *City Electric, Inc.*, 288 NLRB No. 48 (1988); *Riley Electric, Inc.*, 290 NLRB No. 48 (1988).

The effect of the decisions cited above is clear. Here, Respondent signed collective bargaining agreements with Operating Engineers 537 and with Laborers 309, and each contract contained an express commitment to abide by the terms of successor association agreements. Respondent never terminated this delegation of bargaining rights in the contractually prescribed manner. Under the cases cited above, Respondent's obligation to be bound by successor agreements continued to the present.

While the language of delegation of bargaining rights in the Teamsters 371 contract is not as clear as that in Operating Engineers 537 and Laborers 309 agreements, nevertheless the delegation is the logical consequence of Respondent's contractual commitment to be part of the multi-employer bargaining unit. Accordingly, Respondent should be held responsible to abide by the successor contracts negotiated by Teamsters 371 and the Associated Contractors of Rock Island, as these are applicable to the multi- employer bargaining unit referred to in the contract which Respondent signed. Alternatively, Respondent is bound by the automatic renewal language set forth in Teamsters 371's collective bargaining agreement which it signed in 1978.

Similarly, Respondent is bound by the automatic renewal language of its collective bargaining agreement with Cement Masons 544. The Board has held that where an employer has not signed a document delegating bargaining authority to an association but has signed an association collective bargaining agreement with a union providing for automatic renewal, the employer continues to be bound by the collective bargaining agreement until it serves timely notice of termination of the agreement. The Board has stated that in such circumstances, the union's notice of termination of the contract, served on the association, does not terminate the contract as to the employer who has not delegated bargaining rights to the association. *C.E.K. Industrial Mechanical Contractors, Inc., Cam-Ful Industries, Inc.*, 295 NLRB No. 70 (1989) (slip op. at 1-4).

Needless to say the fact that the number of employers who are members of the Association rises or falls or the fact that many members of the Association withhold bargaining authority from the Association is irrelevant.

In short, Respondent violated Section 8(a)(1) and (5) of the Act by repudiating its collective bargaining agreements with the four Charging Party Unions during the term of the contracts and by withdrawing recognition from the four Charging Party Unions.

The contracts now in effect with Laborers 309 (General Counsel 5), Operating Engineers 537 (General Counsel 7), and Teamsters 371 (General Counsel 10) terminate on April 30, 1992. The year to year roll-over contract with Cement Mason 544 terminates April 30, 1991. If the Respondent wants to repudiate these 8(f) contracts it is free to do so. But it must do so in the manner prescribed in the contracts.

Conclusions of Law

1. The Respondent is an employer engaged in commerce with the meaning of Section 2(6) and (7) of the Act.

2. The Unions, Laborers 309, Operating Engineers 537, Cement Masons 544, and Teamsters 371, are labor organizations within the meaning of Section 2(5) of the Act.

3. By repudiating its current collective-bargaining agreements with the four Charging Party Unions and withdrawing recognition from those Unions prior to the expiration of the collective-bargaining agreement, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I will recommended that it be ordered

to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. The Respondent will be ordered to make whole, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), any employees for losses they may have suffered as a result of the Respondent's failure to adhere to the contracts, with interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Upon the foregoing findings of facts, Conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issued the following recommended:

ORDER[1]

Respondent, Cedar Valley Corp., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Withdrawing recognition during the term of a collective-bargaining agreement from the four Charging Party Unions, as the exclusive collective-bargaining representatives of the Respondent's employees covered by the agreement.

(b) Refusing to adhere to its current collective-bargaining agreements with the four Charging Party Unions.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act:

2. Take the following affirmative action necessary to effectuate the policies of the Act.

---

[1] If no exceptions are filed as proved by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Make whole the above-described employees, in the manner set forth in the remedy, for any losses they may have suffered as a result of the Respondent's failure to adhere to its contracts.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Waterloo, Iowa office copies of the attached notices marked "Appendix I," "Appendix II," "Appendix III," and "Appendix IV."[2] Copies of the notices, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the attached notices for posting by the four Charging Party Unions, if willing, in conspicuous places where notices to employees and members are customarily posted.

---

[2] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARDS" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 33, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply herewith.[3]

Dated, Washington, DC June 4, 1990

Martin J. Linsky
Administrative Law Judge

3 General Counsel's Motion to Correct Transcript is granted.

APPENDIX I

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT, during the term of a collective bargaining agreement, repudiate that agreement and/or withdraw recognitions from Local Union No. 309, Laborers' International Union of North American, AFL-CIO as the exclusive collective bargaining representative of our employees covered by that agreement.

WE WILL recognize and, upon request, bargain collectively and in good faith concerning application of the current agreement with Local Union No. 309, Laborers' International Union of North American, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit described in the effective bargaining agreement described above during the term of that agreement.

WE WILL honor and follow the terms of the above-described agreement with Local Union No. 309, Laborers' International Union of North American, AFL-CIO, which expires on April 30, 1992 whenever we are engaged in projects which fall within its terms or scope.

WE WILL make employees whole for any losses they may have suffered as a result of our failure to adhere to the collective bargaining agreement as described above as it pertains to the Interstate 280, Scott County project.

CEDAR VALLEY CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 411 Hamilton Blvd, 16th Floor, Peoria, IL 61602-1104, Telephone (309) 360-7078. JD-106-90

APPENDIX II

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT, during the term of a collective bargaining agreement, repudiate that agreement and/or withdraw recognitions from Local Union No. 554, The Operative Plasterers and Cement Masons International Association, AFL-CIO as the exclusive collective bargaining representative of our employees covered by that agreement.

WE WILL recognize and, upon request, bargain collectively and in good faith concerning application of the current agreement with Local Union No. 554, the Operative Plasterers and Cement Masons International Association, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit described in the effective bargaining agreement described above during the term of that agreement.

WE WILL honor and follow the terms of the above-described agreement with Local Union No. 554, the Operative Plasterers and Cement Masons International Association, AFL-CIO, which expires on April 30, 1992 whenever we are engaged in projects which fall within its terms or scope.

WE WILL make employees whole for any losses they may have suffered as a result of our failure to adhere to the collective bargaining agreement as described above as it pertains to the Interstate 280, Scott County project.

CEDAR VALLEY CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 411 Hamilton Blvd, 16th Floor, Peoria, IL 61602-1104, Telephone (309) 360-7078. D-106-90

APPENDIX III

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT, during the term of a collective bargaining agreement, repudiate that agreement and/or withdraw recognitions from Local Union No. 537, International Union of Operating Engineers, AFL-CIO as the exclusive collective bargaining representative of our employees covered by that agreement.

WE WILL recognize and, upon request, bargain collectively and in good faith concerning application of the current agreement with Local Union No. 537, International Union of Operating Engineers, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit described in the effective bargaining agreement described above during the term of that agreement.

WE WILL honor and follow the terms of the above-described agreement with Local Union No. 537, International Union of Operating Engineers, AFL-CIO, which expires on April 30, 1992 whenever we are engaged in projects which fall within its terms or scope.

WE WILL make employees whole for any losses they may have suffered as a result of our failure to adhere to the collective bargaining agreement as described above as it pertains to the Interstate 280, Scott County project.

CEDAR VALLEY CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 411 Hamilton Blvd, 16th Floor, Peoria, IL 61602-1104, Telephone (309) 360-7078. JD-106-90

APPENDIX IV

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT, during the term of a collective bargaining agreement, repudiate that agreement and/or withdraw recognitions from Teamsters, Chauffeurs, Warehousemen and Helpers Local 371 as the exclusive collective bargaining representative of our employees covered by that agreement.

WE WILL recognize and, upon request, bargain collectively and in good faith concerning application of the current agreement with Teamsters, Chauffeurs, Warehouseman and Helpers Local 371 as the exclusive bargaining representative of the employees in the bargaining unit described in the effective bargaining agreement described above during the term of that agreement.

WE WILL honor and follow the terms of the above-described agreement with Teamsters, Chauffeurs, Warehousemen and Helpers Local 371, which expires on April 30, 1992 whenever we are engaged in projects which fall within its terms or scope.

WE WILL make employees whole for any losses they may have suffered as a result of our failure to adhere to the collective bargaining agreement as described above as it pertains to the Interstate 280, Scott County project.

CEDAR VALLEY CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 411 Hamilton Blvd, 16th Floor, Peoria, IL 61602-1104, Telephone (309) 360-7078.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 91-2160

Cedar Valley Corp.	*	
Petitioner,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
vs.	*	
National Labor Relations Board,	*	
Respondent.	*	

The suggestion for rehearing en ban is denied. The petition for rehearing is also denied.

November 27, 1992

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit